

THE LAWYER'S COMPANION SERIES.

THE
LAW OF ARBITRATION

BY

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AT THE LAWYER'S COMPANION OFFICE, TRICHINOPOLY.

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P R E F A C E .

In this volume I have endeavoured to collect together the Law of Arbitration which is found scattered through various Acts of the Legislature, Imperial and Local. This book consists of three parts: Part I deals with the Indian Arbitration Act (IX of 1899); Part II contains the provisions of the Code of Civil Procedure relating to Arbitration; Part III collects extracts from other enactments dealing with arbitration. All the cases from all the available reports in this country have been consulted and noted. As the Indian Arbitration Act, 1899, is, with very few modifications, a reproduction of the English Statute, 52 and 53 Vic., C. 49 and as it has not yet had the advantage of much judicial interpretation by the Courts in India, I have had to draw largely on the English decisions. For the collection of English authorities and the elucidation of certain principles, I am indebted to the valuable and exhaustive work of Russell on Arbitration and Award, and to Lord Halsbury's Laws of England and to Mew's Digest of English Cases.

For facilitating a comparative study of the subject, I have given under each section reference to analogous provisions in other enactments. The English Statute upon which the Indian Arbitration Act is based is given in the Appendix.

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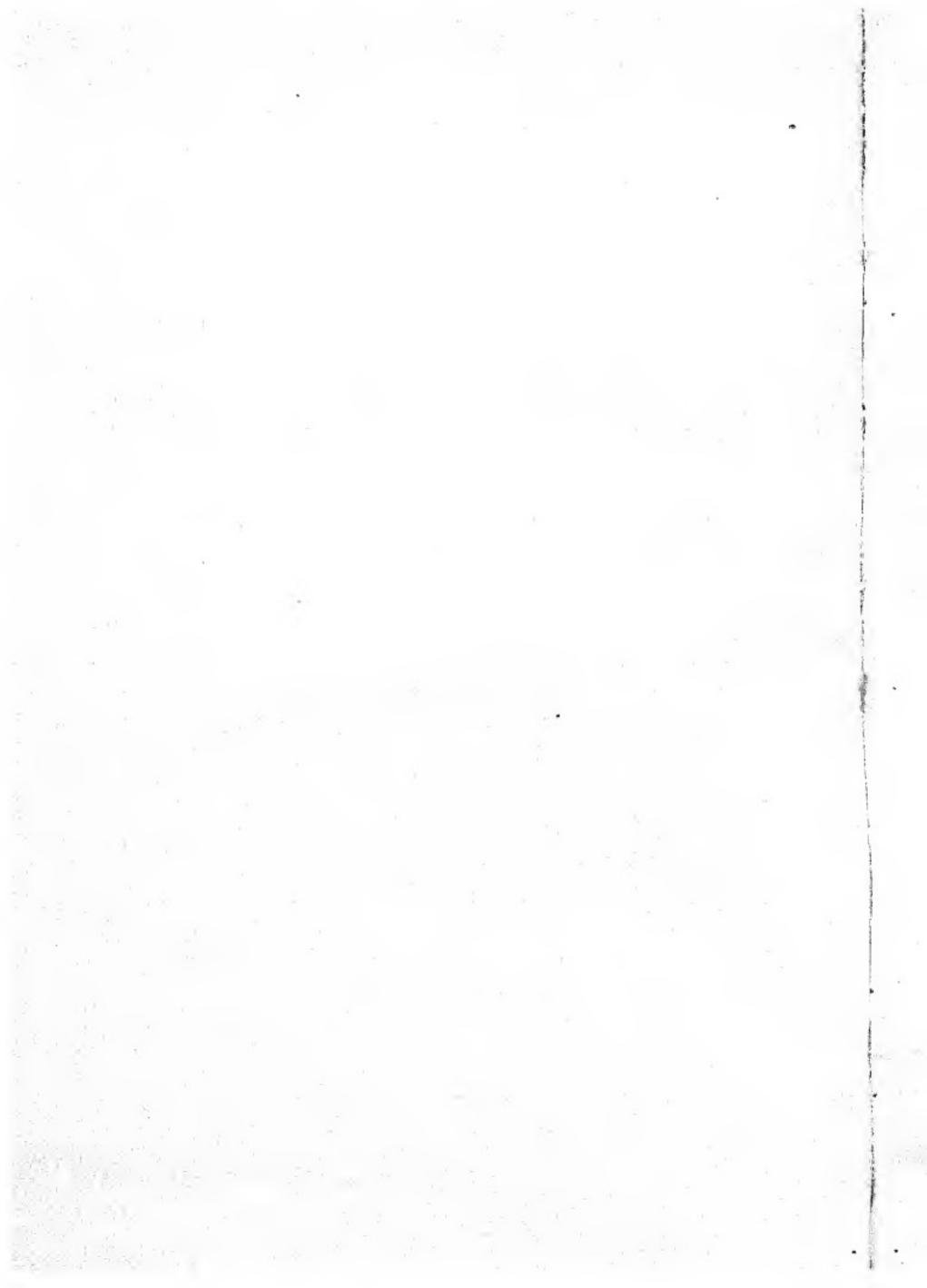
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* At page 76, 25 C is wrongly marked as = to 34 B 372.

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* At page 168, read 35 I A 88 for 35 I A 83.

† At page 170, read 4 Ind Cas 871 for 4 Ind Cas 87.

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*At page 132, U.B.R. 1902 Jurisdiction 1 is wrongly printed as U.B.R. 1903 June 1.
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STATUTE LAW
RELATING TO
ARBITRATION IN BRITISH INDIA.

PART I.

THE INDIAN ARBITRATION ACT.

(ACT IX OF 1899.)

(RECEIVED THE ASSENT OF HIS EXCELLENCY THE GOVERNOR-GENERAL ON THE 3RD MARCH 1899.)

HISTORICAL MEMOIR.

Year.	No. of Act.	Name of Act.	How affected.
1899	IX	The Arbitration ...	Amended, Act VI of 1900, S. 47 and Sch. I. Rep. in part, Act VII of 1918.

An Act to amend the Law relating to Arbitration.

WHEREAS it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice¹; It is hereby enacted as follows:—

(NOTES).

1.—“Without the intervention of a Court of Justice.”

(1) Reference with the intervention of Court.

Where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply, and the powers of the arbitrators are governed by the second schedule of the Civil Procedure Code. 12 Bom. L.R. 852. A

(2) Arbitration with respect to the subject of a suit.

With regard to the arbitration so far as it affects the subject of the suit, the arbitrators could only take the opinion of the Court under Rule 11 of Sch. II of the Civil Procedure Code, which provides that, upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and form part of the award. 12 Bom. L.R. 852 (858). B

I.—“Without the intervention of a Court of Justice”—(Concluded).

Short title, extent and commencement. 1. (1) This Act may be called the Indian Arbitration Act, 1899 ¹.

- (2) It extends to the whole of British India; and
- (3) It shall come into force on the first day of July 1899.

(NOTE).

*I.—“Indian Arbitration Act, 1899.”***Source of the Act.**

This Act is based upon the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. C

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town ¹:

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, declare this Act applicable in any other local area as if it were a Presidency-town.

(NOTES).

I.—“If the subject-matter submitted....in a Presidency town.”

(1) Where suits may be instituted elsewhere than in a Presidency town.

The term “could be instituted in a Presidency town” in this section is not limited to suits which cannot be instituted elsewhere than in a Presidency town, but applies to suits which can, at the plaintiff's option, be instituted in a Presidency town or elsewhere. 144 P.R. 1906. D

(2) Application to file award—Jurisdiction.

This section is not very clearly worded, but a consideration of this section and of those sections of the Civil Procedure Code which relate to the place of suing lead to the conclusion that an application to file an award must be made in that Court which would have jurisdiction to entertain a suit relating to the matter submitted to arbitration. 4 S.L.R. 20 (21). E

(3) Jurisdiction of Karachi Courts to appoint arbitrator or file award.

(a) The Karachi Courts have jurisdiction to appoint an arbitrator under this Act, where differences have arisen between the parties to a contract for purchase of goods, entered into on terms known as the K.P. or “Karachi Pass Terms.” 4 S.L.R. 10=7 Ind. Cas. 588. F

(b) Where a dealer in Multan made a contract with an European firm in Karachi, under which the firm made advances on consignments of wool, and undertook to make all necessary arrangements for shipping the goods, selling them in Europe, and for remitting money to and from Europe, the dealer undertaking to pay redrafts for shortages; on evidence being given that the redrafts were expressly made payable in Karachi, and that the practice was to remit all amounts due to Karachi, and there having been a reference to arbitration in pursuance of a submission contained in the agreement:

Held, that the Court at Karachi had jurisdiction to entertain an application for filing the award. 3 S.L.R. 8. G

I.—“*If the subject-matter submitted....in a Presidency town*”—(Concluded).

(c) In a similar case, it was held that the cause of action arose in part at Karachi and the Karachi Courts had jurisdiction to file an award based on a submission contained in the contract. 8 S.L.R. 107=27 Ind. Cas. 129. H.

(4) Contract made in Lahore—Agreement to refer disputes to merchant in Karrachee.

(a) A, carrying on business at Lahore, contracted, by a series of agreements with B, to deliver large quantities of wheat within certain periods. No such deliveries were made. A clause of the contracts provided that any dispute whatsoever arising under the contracts would be referred to the arbitration of two European merchants residing in Karrachee. B, relying on the clause, applied that agreement for reference be filed in Court:

Held, that the dispute in case of non-delivery could not be treated as one for arbitration in Karrachee, even if the clause for reference was otherwise valid. 54 P.W.R. 1913=124 P.L.R. 1913=18 Ind. Cas. 816. I

(b) The validity of the clause for submission under the particular circumstances of the case doubted. (*Ibid.*) J

(5) Sale of unascertained goods—Cause of action where arises.

The defendant in this case entered into a contract with the plaintiff's agents at M for supply of goods which were then unascertained, and agreed either to deliver the goods to the plaintiff's agent at M to be forwarded to K at the defendant's risk, or to forward the goods himself direct to K. The agreement also provided that in both the cases goods had to be tested and accepted or rejected by the plaintiffs at K. *Held* that inasmuch as the performance of the contract could be only completed at K, the Courts at K have jurisdiction to entertain a suit based on the contract, and also to entertain an application to file the award based on the submission contained in the contract. 4 S.L.R. 20. K

3. The last thirty-seven words of section 21 of the Specific Relief I of 1877.

Exclusion of certain enactments in certain cases where Act applies¹.
Act, 1877, and sections 523 to 526 of the Code of XIV of 1882.
Civil Procedure shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply:

Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made.

(NOTES).

Legislative change.

The second proviso to this section has been repealed by the Indian Companies Act, VII of 1913. L

*I.—“Exclusion of certain enactments....applies.”***Nature of the agreement to refer to arbitration.**

The effect of S. 28, Contract Act, S. 21 of the Specific Relief Act read with the related sections of the Indian Arbitration Act and of the Civil Procedure Code dealing with arbitration is that a person may not contract himself out of his right to have recourse to Courts of law, but in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Court. 11 Bom. L.R. 275. M

Definitions. 4. In this Act, unless there is anything repugnant in the subject or context—

- (a) “the Court” means, in the Presidency-towns, the High Court, and, elsewhere, the Court of the District Judge; and
- (b) 1 “submission” means a written agreement² to submit present or future differences³ to arbitration⁴, whether an arbitrator is named⁵ therein or not.

(NOTES).

*I.—“Clause (b).”***(1) Corresponding English Law.**

The definition of submission in this section is word for word the same as that contained in the English Arbitration Act, 1893, 52 and 53 Vict. c. 49, S. 27. N

(2) Analogous provisions in the Indian Law.

Compare :—(i) Code of Civil Procedure (Act V of 1908), Second Schedule, Rules, 1, 17 and 20.
 (ii) Indian Companies Act (VII of 1913), S. 152.
 (iii) The N.W.P. and Oudh Land Revenue Act (III of 1901), S. 203.
 (iv) The Punjab Land Revenue Act (XVII of 1887), S. 127.
 (v) The Indian Contract Act (IX of 1872), S. 28. O

*2.—“Written agreement.”***(1) Written agreement, meaning.**

A ‘written agreement’ is an agreement to which both parties have assented in writing. 6 S.L.R. 278=19 Ind. Cas. 925. OI

(2) Submission and contract to submit—Difference.

The distinction between the submission of a dispute to a named arbitrator, and a contract to submit disputes to an arbitrator is this. The former is commonly termed a reference; the latter ordinarily takes the form of an arbitration clause; the one is a contract, the other is a delegation of authority. 7 S.L.R. 1 (4). O2

(3) Agreement to submit to be in writing.

To constitute a submission within the meaning of the Act, the agreement to submit to arbitration must be in writing and signed by both parties as their agreement. *Caerleon Tinplate Co. v. Hughes*, 60 L.J.Q.B. 640=65 L.T. 118, P

2.—“Written agreement”—(Continued).

(4) Agreement in writing not signed.

- (a) A submission must be in writing but it need not be signed. It is sufficient if the parties have definitely agreed to refer the matters in dispute to arbitration and their agreement has been reduced to writing. 4 S.L.R. 149 (151). Q
- (b) But in 6 S.L.R. 278=19 Ind. Cas. 925, it was held that to constitute a written agreement within this section, there must be an agreement to which both parties have given assent in writing. R

(5) Written agreement and document embodying terms of agreement—Difference.

There is an essential difference between a written agreement and a document which merely embodies the terms of an agreement. Such document may be evidence of the agreement, but is not the agreement itself. If one party only attaches his signature, then it is a document embodying the terms of an agreement to which one party has expressed his assent in writing, but it is not a written agreement in writing unless the assent of both parties has been so expressed. 6 S.L.R. 278=19 Ind. Cas. 925 (*Ex parte Munro, In re Lewis*, (1872) 45 L.J.Q.B. 1816; 1 Q.B.D. 724; 85 L.T. 857; 24 W.R. 1017 and *Caerleon Tinplate Company (Limited) v. Hughes*, 60 L.J.Q.B. 640; 65 L.T. 118, R.) S

(6) Broker's entry of contract in purchaser's books, whether a written agreement.

A memorandum of a contract made by a broker and signed by him as such in the books of the purchaser is nothing more than a written intimation by the broker to the purchaser that a contract has been effected, but it does not by itself constitute a 'written agreement' within the meaning of this section. 6 S.L.R. 278. S1

(7) Reference to Bengal Chamber of Commerce—Rules of the Chamber if applicable to such arbitration.

If a party to a contract has agreed to submit to arbitration, under the Arbitration Act, of the Bengal Chamber of Commerce, he must be held to be bound by the Rules of that Chamber on that behalf. 19 C.W.N. 820=21 O.L.J. 584=42 C. 1140. S2

(8) Arbitration and a ward by Bengal Chamber of Commerce—Jurisdiction.

An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plaintiffs disregarding the fact the contract in question was made by plaintiffs as brokers although in fact the plaintiffs had no principals and the contract was not therefore enforceable. The plaintiffs alleged that there was a custom in the market in respect of gunny, hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well-known to the Chamber, the award was properly made and valid.

The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it.

Held, that the usage being known to the Chamber the matter was within the jurisdiction and the award was properly made. 20 C.W.N. 365. S3

(9) Arbitration in London between Calcutta purchaser and London purchaser.

A London award in a submission by the Calcutta purchaser and the London purchaser in accordance with the rules and conditions of the London

2.—“Written agreement”—(Continued).

Association contract of 1913, would be binding in a dispute between the Calcutta seller and the Calcutta buyer. To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect. 43 C. 77. S 4

(10) Mere stipulation without agreement—Effect.

A mere stipulation inserted by one party and not formally agreed to by the other does not constitute such a submission. *Caerleon and another*, 60 L.J. Q. B. 640 (1891); 10 C.W.N. 814=33 C. 1287. T

(11) Use of words ‘office dhara’ or ‘office terms’ in contract—Effect.

Nor can the mere use of the words ‘office dhara’ or ‘office terms’ in a contract constitute a written agreement to submit differences to arbitration. They are at most symbols to denote that such an agreement has been made. 6 S.L.R. 278=19 Ind. Cas. 925. U

(12) Parol submission.

The Arbitration Act does not apply to a parol submission so as to authorise a stay of proceedings. *Russell*, 9th Ed., p. 55. V

(13) Award on oral submission not an adjustment.

In this case the parties to an administration suit appeared before the Assistant Commissioner and orally agreed to be bound by his decision on the matters in dispute. The Assistant Commissioner made an award, but the defendant considered that he awarded an insufficient amount and declined to be bound by the award. Plaintiff applied for an adjustment of the suit under S. 375, Civ. Pro. Code (1882) on the basis of the Assistant Commissioner’s decision. Held, there had been no adjustment of the suit. There had been no written submission to arbitration as provided by S. 4 of the Arbitration Act, and consequently there had been no legal and valid reference and the mere award of the Assistant Commissioner had no legal foundation and could have no legal consequences. 10 Bom. L.R. 366=33 B. 69. W

(14) Agreement by deed—Appointment by parol.

If the appointment of the arbitrators was by parol, it would be only a parol submission even though the agreement were by deed. *Ex parte Glaysher*, 8 H. & C. 442=34 L.J. Ex. 41. X

(15) Contract signed by broker in the books of the purchaser.

The memorandum of a contract made by a broker, and signed by him as such, in the books of the purchaser, cannot by itself constitute a written agreement within the section. 6 S.L.R. 278=19 Ind. Cas. 925. Y

(16) Submission in writing not under seal—English Law.

Under the English Arbitration Act, 1893, parties may refer their differences by agreement in writing not under seal. *Russell*, 9th Ed., p. 55. Z

(17) Agreement need not be on a single paper.

(a) To constitute a submission, it is not necessary that there must be an agreement on a single piece of paper signed by both parties. It is sufficient if the bought and sold notes, containing a term to refer to arbitration, are signed by both parties or their authorised agents. 10 C.W.N. 814=33 C. 1287. A

2.—“Written agreement”—(Continued).

- (b) It is not necessary that the assent of each party shall be written on the same piece of paper. It is sufficient if each party sign a separate document, provided that each contains the complete terms of the agreement. 19 Ind. Cas. 925. (See also *Aitken v. Batchelor*, 62 L.J.Q.B. 193=5 R. 218=68 L.T. 580.) B
- (18) Arbitration clause contained in bought note, but not in sold note.
A provision for arbitration in case of dispute contained in the bought note signed by one party, but not in the sold note signed by the other party, does not amount to submission. *Caerleon Tinplate Co. v. Hughes*, 60 L.J.Q.B. 640=65 L.T. 118. C
- (19) Stipulation in an insurance policy.
(a) A proviso in an insurance policy stipulating that differences arising between the company and the insured should be referred to arbitration amounts to a submission to arbitration, although the policy was not signed by the policy-holder. *Baker v. Yorkshire, &c., Insce. Co.*, (1892) 1 Q.B. 144; D
(b) A condition in a policy of life insurance, effected by a foreigner with an English Insurance Company, which had a branch office at Budapest, to the effect that, “for all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters,” constitutes a submission within the meaning of this section. *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, (1908) 1 K.B. 249; 72 L.J.K.B. 211. E
- (20) Counsel on each side noting on his own brief.
Where an action was settled in Court, and counsel on both sides endorsed and signed a note, each on his own brief, “counterclaim withdrawn...claims shall be referred to arbitration as quickly as possible,” the Court held that such endorsements taken together constituted a submission within this section. *Aitken v. Batchelor*, 62 L.J.Q.B. 193=5 R. 218=68 L.T. 580. F
- (21) Original instrument need not contain the written agreement.
The written agreement need not be contained in the original instrument under which the matter in dispute arose. *Randell v. Thompson*, 1 Q.B.D. 748=45 L.J.Q.B. 718; *Mason v. Haddan*, 6 C.B.N.S. 526. But see *Blyth v. Lafone*, 1 E. & B. 435=28 L.J.Q.B. 164. G
- (22) Arbitration clause in a contract.
An arbitration clause in a contract amounts to a “submission” within the meaning of this section and is valid, being covered by exception (1) to S. 28 of the Contract Act. 33 C. 1169. H
- (23) Arbitration clause—Provision for notice within seven days after dispute.
An arbitration clause in a contract for the erection of an electric plant provided that any dispute or difference arising between the parties as to the construction of the contract, or the rights or liabilities of parties, should be referred to arbitration, “provided that no such dispute or difference shall be deemed to have arisen or be referred to arbitration hereunder unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises.” The buyers having rejected the plant, the sellers, more than seven days thereafter, wrote

2.—“Written agreement”—(Continued).

repudiating the rejection, and subsequently sued the buyers for the price. The defendants having pleaded the arbitration clause, the pursuers contended that it was inapplicable on the ground that no notice had been given of the dispute within seven days after it had arisen.

Held—that the dispute did not arise until the date of the pursuers' letter repudiating the rejection, but that the letter of repudiation was of itself notice of the existence of the dispute, and that, accordingly, the arbitration clause was applicable. *Houlden and Co., Ltd. v. Powell Duffryn Steam Coal Co., Ltd.*, (1912) S.C. 920=49 Sc. L.R. 605. I

(24) Sale of goods—Condition referring disputes to arbitration—Notice.

A member of the Glasgow Flour Trade Association sold flour to a purchaser (who was not a member), the terms of the contract being contained in sale-notes delivered to and accepted by the purchaser. Each sale-note contained on the margin these words : “any dispute under this contract to be settled according to the Rules of the Glasgow Flour Trade Association.” One of these rules provided that all disputes should be referred to arbitration. No copy of the rules was sent to the purchaser, and it did not appear that he was aware of their terms.

Held—that the purchaser had not received reasonable notice of the condition referring disputes to arbitration, and accordingly that he was not bound by that condition. *M'Connell and Reid v. Smith*, (1911) 48 Sc. L.R. 564. J

(25) Railway contract—General Arbitration Clause—Question of law.

A railway company entered into an agreement with another railway company to work and maintain a line of railway which the second company undertook to construct. In terms of the agreement the first company came under an obligation to pay the second company such a sum as would be sufficient to make up the annual dividend to 4 per cent. on the “paid-up share capital” of the second company. The agreement contained this clause—“All questions which may arise between the parties hereto in relation to this agreement, or to the import out of the same, shall be referred to arbitration.....” A question having arisen as to whether the *ex facie* paid-up share capital of the second company, looking to the mode in which it had been created, which was said to have been *ultra vires*, was truly “paid-up share capital” in the sense of the agreement. *Held*—that the question was a pure question under the contract, and that, although it was a question of law, it fell under the arbitration clause. *North British Ry. Co. v. Newburgh and North Fife Ry. Co.*, (1911) S.C. 710=48 Sc. L.R. 450. K

(26) Agreement amounting to a bond and not a submission to arbitration.

He, on hearing that his goods were detained by the British Consul at Kuwait, signed a document, the material portion of which ran as follows :—

‘I.....do agree and bind myself to pay to the Director and Political Officer any sum which the said officer adjudges to be due from me on the said account after comparison and settlement of the account between the parties by any two independent and impartial and upright merchants.’

Held, that the said document was only a bond and that it contained no submission to arbitration on which a valid award could follow. 6 S.L.R. 89 = 16 Ind. Cas. 861. (*Reversing* 4 S.L.R. 25.) L

2.—“Written agreement”—(Continued).

(27) No special form of submission required.

- (a) Under this Act, no special form of submission is required; only there must be an agreement to refer and that agreement should be reduced in writing. 4 S.L.R. 26=7 Ind. Cas. 595. M
- (b) A submission may be contained in a clause quite collateral to the main purpose of an agreement. Thus, a bond conditioned “for A.’s due discharge of the duties of clerk,” “to be ascertained by the inspection of A.’s accounts by J.S., and the amount so ascertained to be liquidated damages,” is a submission to the award of J.S. respecting the accounts. *Jebb v. McKierman*, 1 Moody & M. 340. N
- (c) So also a cognovit for one shilling damages and such costs as the prothonotary should think fit, makes the prothonotary an arbitrator respecting the costs. *Elvin v. Drummond*, 1 M. & P. 88=4 Bing. 415. O

(28) Agreement enlarging time or changing arbitrator is a new submission.

An agreement, indorsed on an arbitration deed, or bond, enlarging the time, or changing the arbitrator, is a new submission in writing, incorporating into itself all the terms of the original submission. *Greig v. Talbot*, 2 B. and C. 179; *In re Tunno and Bird*, 5 B. and Ad. 488=8 L.J. (N.S.) K.B. 5; *Evans v. Thompson*, 5 East 189. P

(29) Acquiescence in the mode of ascertaining share due to each partner.

Where a practice has been acquiesced in for the share due to each of the partners in a joint transaction to be made out by the clerk of one of them acting as the servant of all, that is not a submission to the arbitration of the clerk. *Goodyear v. Simpson*, 15 M. & W. 16=15 L.J. Ex. 191. Q

(30) Irregularity in the course of reference—Waiver.

Though an arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such as shews that they have waived any objection on account of it. The waiver must be clearly made out, and the party must be shewn to have full knowledge of the defect which he is said to waive. 14 C.L.J. 188. R

Stamp.

(1) Stamp duty for an agreement to submit.

Contract-notes which contain a provision for submission of disputes to arbitration ought each to bear eight annas stamp under Art. 5, Sch. I of the Indian Stamp Act, 1899, as an agreement not otherwise provided for in the schedule. 13 C.W.N. 63=1 Ind. Cas. 371; B.P.J. (1888), p. 151; Mad. B.P. No. 255, 16th March 1888. S

(2) Letters submitting to arbitration need not be stamped.

Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped. 19 B. 32. T

(3) Agreement contained in bought and sold notes—Stamp.

(a) A contract for or relating to the sale of goods comprised in bought and sold notes, which contain a provision to refer disputes to arbitration, is chargeable with a stamp-duty of two annas on each broker’s note under Art. 48 of the Stamp Act, and not with a duty of eight annas as an agreement. 39 C. 669=16 Ind. Cas. 153. U

2.—“Written agreement”—(Concluded).

A.—Stamp—(Concluded).

- (b) Where such bought and sold notes were stamped with one anna stamps: *Held*, that, on the materials before the Court, the practice of stamping such documents with one anna stamps was not invalid, and the proceedings in arbitration were effectual. 40 C. 219. X

(4) Several parties having separate legal interests submitting to arbitration—Stamp.

One stamp only is necessary, although there are many parties to the submission having separate legal interests, provided they have a sufficient community of interest, in the subject-matter of the reference; as in the case of a submission between the party who has insured a ship and the underwriters on the policy. *Goodson v. Forbes*, 1 March 525. W

(5) Agreement supplemented by a memo. of later date—Stamp.

Where there was a written agreement that a disputed boundary was to be set out by “an indifferent surveyor residing at a distance,” and on the same sheet of paper was added a memorandum of a later date, appointing a particular surveyor residing in the neighbourhood, to set out the boundary, the two memoranda were held to be only one agreement, and to require only one stamp. *Taylor v. Parry*, (1840) 1 M. & G. 604. X

(6) Agreement enlarging time or changing arbitrator requires stamp.

An agreement indorsed on an arbitration deed or bond, enlarging the time or changing the arbitrator, being a new submission, requires an agreement stamp. *Stephens v. Lowg*, 9 Bing. 82=1 L.J. (N.S.) C.P. 150. Y

(7) Document not duly stamped admitted into evidence by arbitrators subsequently called into question.

If a document, which was not duly stamped, was admitted in evidence by arbitrators on a reference, the provisions of S. 36 of the Stamp Act would prevent such admission being called into question at any stage of the same suit or proceeding, except as provided in S. 61, and an application to file the award of the arbitrators would be a “stage of the same proceeding.” 39 C. 669=16 Ind. Cas. 158. Z

3.—“Present or future differences.”

Reference of future disputes.

All the enactments relating to arbitration in India apply only to disputes which had arisen at the time of the agreement to refer, and not to disputes that might arise in future. But this Act provides for the arbitration of future disputes also. Now the Companies Act, 1913, S. 152, provides for reference of existing as well as future differences to arbitration. A

A.—Who may submit.

(1) Submission executed by some parties—Effect.

A submission to arbitration of all matters in difference between the parties or any two of them is void as between the two who have executed, until all the parties have executed it. *Antram v. Chase*, 15 East 209. B

(2) Reference by one partner.

One partner cannot bind his co-partner by a reference without his consent. *Adams v. Rankart*, 1 C.M. & R. 681=5 Tyr. 425=1 Gale 481=4 L.J. Ex. 69; *Trend v. Salt*, 3 Bing. 101=10 Moore 889=3 L.J. (O.S.) C.P. 175=28 R.R. 602. C

3.—“Present or future differences”—(Continued).

A.—Who may submit—(Continued).

(3) Reference by an infant.

As an infant is unable to bind himself by contract, he cannot enter into a submission, which will render the award absolutely binding on him. 14 C. L.J. 188. D

(4) Court's power to authorise submission so as to bind the infant.

In the case of a pending suit, the Court may authorise a submission to arbitration so as to render the award binding on the infant. 14 C.L.J. 188. E

(5) Party to reference knowing that the other party is infant—Estoppel.

Where a party to a reference knows at the time of entering into it that another party thereto is an infant, he cannot afterwards object to the award on that ground. *Wrightson v. Bywater*, 3 M. & W. 199=1 H. & H. 50=7 L.J. Ex. 88; *Jones Powell*, 7 D.P.C. 488=1 W.W. & H. 60; *Warner, In re*, 2 D. & L. 148=18 L.J. Q.B. 370=8 Jur. 1097. F

(6) Submission by guardian.

(a) A guardian may submit to arbitration on behalf of his ward so as to bind both himself and the ward, though, where the guardian is, in his individual capacity, a party to the submission, and his interest in the controversy submitted happens to be adverse to that of his ward, he has no power to submit on behalf of his ward. 14 C.L.J. 188. (But see *in re*). G

(b) A submission to arbitration by a guardian, on behalf of his ward, binds the guardian only. *Hurley, In re*, 1 Hay. & J. 160. H

(7) Submission by father or manager.

The father or manager fully represents the family and a reference to arbitration by the father or manager will, in the absence of fraud or collusion, be binding on the other members of the family. What we have to look to is whether the reference was for the benefit of the family. To seek an adjudication on a claim disputed or liable to be disputed, in the cheapest way possible, would be the act of a prudent manager, especially if he believes that part of the claim is irrecoverable in law or in regard to the debtor's ability to pay. 10 N.L.R. 74=24 Ind. Cas. 868. H 1

(8) Submission by mother for her minor children.

The mother, as the natural guardian of her own minor children, can refer to arbitration questions involving her children's interests. 8 Bur. L.T. 122 = 29 Ind. Cas. 800. H 2

(9) Submission by a bankrupt.

A submission by a bankrupt, though of matters which have passed to his assignees, is not void; and payment of costs pursuant to the award may be enforced against him. *Milnes and Robertson, In re*, 15 C.P. 451=24 L.J. C.P. 29=18 Jur. 1108. I

(10) Reference by an assignee of a business.

An assignee of a business, with a power of attorney authorising him to bring in the names of the assignors any action or suit or other proceeding to enforce any existing contracts, and otherwise to deal in respect thereof as he might think proper, has authority to refer both an action brought by him in their names for payment for work done under an existing contract and

3.—“Present or future differences”—(Continued).

A.—Who may submit—(Concluded).

a cross claim against them for damages for not properly performing the work, although they do not consent to the reference. *Hancock v. Reid*, 2 L.M. & P. 584=21 L.J. Q.B. 78=15 Jur. 1036. J

(11) Reference by assignee of debt.

An assignee of debts, with a power of attorney to compound for and receive them, may refer in his own name subsisting references between the assignor and a debtor. *Banfill v. Leigh*, 8 Term Rep. 571. K

(12) Power for Companies to refer matters to arbitration.

See S. 152 of Act VII of 1913.

N.B.—For other cases under the heading ‘Who may refer,’ see notes under Rule 1 of 2nd schedule to Civ. Pro. Code, 1908, *infra*. L

B.—What may be referred.

(1) Dispute concerning personal chattel or personal wrong.

All matters in—may be referred to arbitration. *Blake's Case*, 6 Rep. 43 b. M

(2) Price of property.

Differences respecting purchase price of property may be referred. *Round v. Hatton*, 10 M. & W. 660=12 L.J. Ex. 7. N

(2-a) Failure to pay claim.

A mere failure to pay a claim constitutes a matter in difference. 7 S.L.R. 113=24 Ind. Cas. 264. See, also, 5 S.L.R. 4. N1

(3) Questions relating to tolls.

All—may be referred. *Allen v. Milner*, 2 C. & J. 47=1 L.J. (N.S.) Ex. 7. O

(4) The right to tithes.

—may be referred. *Prosser v. Goringe*, 8 Taunt 426. P

(5) Partition of the lands of joint tenants.

The—may be referred. *Knight v. Burton*, 6 Mod. 231. Q

(6) Partition of the lands of tenants-in-common.

The—may be referred. *Johnson v. Wilson*, Willes 248. R

(7) Settlements of disputed boundaries.

—may be referred. *Taylor v. Parry*, 1 M. & J. 604. S

(8) Questions between landlord and tenant respecting waste.

All—may be referred. *Hunter v. Rice*, 15 East 100. T

(9) Title to land by devise.

Question of—may be referred. *Downs v. Cooper*, 2 Q.B. 256. U

(10) Question of law may be referred.

(a) Pure questions of law may be referred to the decision of an arbitrator. *Ching v. Ching*, 6 Ves. 281; *Young v. Walter*, 9 Ves. 364. V

(b) So the question of the liability of a party on a promissory note may be referred to arbitration. *Wilkinson v. Page*, 1 Hare, 276. W

3.—“Present or future differences”—(Continued).

B.—What may be referred—(Continued).

(11) Validity of judgment may be referred.

The question whether a judgment has been properly obtained, whether it has been satisfied, whether it is void or erroneous may be referred to arbitration. *Barry v. Grogan*, 16 W.R. 727. X

(12) Construction of a will.

The construction of a will may be referred to arbitration. *Steff v. Andrews*, 2 Madd. 6. Y

(13) Dispute between husband and wife.

The question whether a sufficient cause for judicial separation between husband and wife does or does not exist, may be referred to arbitration. *Vansittart v. Vansittart*, 27 L.J. Ch. 222. Z

(14) Submission of the question of dissolution of partnership.

There is nothing to prevent the question, whether or not there shall be a dissolution of partnership, from being submitted to arbitration, but where this is done, the Court has full discretion to decide whether, under the circumstances of the case, the question is one which ought or ought not to be left to an arbitrator. A clause in partnership referring all matters in difference between partners to arbitration is sufficient to include the question of dissolution, and an arbitrator acting thereunder is empowered to decide whether or not the partnership shall be dissolved. *Walmsley v. White*, 40 W.R. 675; *Vaudrey v. Simpson*, (1896) 1 Ch. 166; *Joplin v. Postlethwaite*, 61 L.T. 629; *Turnell v. Sanderson*, 60 L.J. Ch. 708; *Russell v. R.*, 14 C.D. 471; *Machin v. Bennet*, W.N. (1900), 146. A

(15) Illegal items in account.

Where transactions between parties have been closed by a general award apparently good, the Courts have refused to re-open them on a suggestion that some illegal item has been admitted in account. *Russell*, 9th Ed., p. 3. B

(16) Illegal matters cannot be referred.

When the subject-matter is clearly illegal, no binding award can be made. *Russell*, 9th Ed., p. 3. C

(17) Future use of property.

The future conduct of parties with respect to the enjoyment of property, in matters beyond the power of any Court to prescribe, is often submitted to the regulation of an arbitrator. *Russell*, 9th Ed., p. 3. D

(18) Reference of criminal matters.

ENGLISH LAW.

(i) Some criminal matters, and the criminal proceedings founded on them, may be submitted to arbitration. To ascertain what these matters are, it is important to consider in what cases the law will allow a criminal charge to be disposed of by private agreement or compromise. For the power to refer must be dependent upon the power to compromise. The old rule that matters criminal are not arbitrable because they are to be punished for the

3.—“Present or future differences”—(Continued).

B.—What may be referred—(Concluded).

public good applies universally in cases of felony. But an agreement to settle a misdemeanour may, in some cases, be perfectly valid in law. *Russell*, 9th Ed., pp. 24 and 25. E

- (ii) The rule as stated by Gibbs, C.J., in *Baker v. Townshend* (7 Taunt 422) is that :—“ Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced.” F
- (iii) The law will permit a compromise of all offences for which the injured party might sue and recover damages in an action. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling the prosecution of it. *Per Lord Denman, C.J.*, in *Kesir v. Leeman*, 6 Q.B. 308 = 18 L.J.Q.B. 259. G

INDIAN LAW.

S. 845 of the Code of Criminal Procedure lays down the law as to the compounding of offences in India. H

C.—Construction of submission.

(1) “All matters in difference,” meaning.

Where a defendant submitted all matters in difference, and the arbitrators required him, in pursuance of a power given them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them : Held, that he could not, by affidavit, bring before the Court the question whether those books related to matters in difference between them or not, though it was expressly sworn that the books merely related to old accounts, which had been long since settled, and which it had been agreed between them should form no part of the reference ; because by the general terms of the submission of all matters in difference, it was left in the discretion of the arbitrator to say what were matters in difference, and what were not. *Arbuckle v. Price*, 4 D.P.C. 174. I

(2) Disputes arising after submission.

A submission of all matters in difference does not include any subjects of dispute arising after the submission. *Brown v. Croydon Canal Co.*, 9 A. & B. 522 ; 8 L.J. Q.B. 92.

(3) “Anything relating to matters” submitted.

On a submission to arbitration the parties agreed to abide by the award “of and concerning the premises or anything in any wise relating thereto.” The arbitrators awarded that a certain sum should be paid with interest up to a day subsequent to the date of the award : Held, that they had exceeded the powers of the submission in so awarding. *Morphett, in re*, 2 D. & L. 967 = 14 L.J.Q.B. 259 = 10 Jur. 546. K

(4) “Shall or may.”

In a reference it was agreed that the arbitrator “shall or may” award a certain matter with a proviso, &c., held, that the words “shall or may” were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the context of the agreement, and the situation of the parties, requiring such a construction. *Crump v. Adney*, 1 C. & M. 355 ; 3 Tyr. 270 ; 2 L.J. Ex. 150. L

3.—“Present or future differences”—(Continued).

C.—Construction of submission—(Continued).

(5) “Any application to Court”—Construction.

A reference contained a clause that, in the event of any application being made to the Court on the subject of the award, the Court shall have power to remit the matter to the arbitrator for reconsideration : *Held*, that a rule for payment of money under the award was “an application on the subject of the award.” within the clause and empowered the Court to remit the matters to the arbitrator. *Johnson v. Latham*, 1 L.M. & P. 848=19 L.J. Q.B. 829. M

(6) *Mugaddamma* referred.

Where parties apply to Court to refer their *mugaddamma* to the arbitration of a particular person, the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties ask for the settling of all their disputes through arbitration. 15 Ind. Cas. 821. N

(7) “Office terms.”

The mere inclusion of the expression “Office terms” or “Office Dhara” in a contract does not constitute a submission. 6 S.L.R. 278. O

(8) Question as to construction of contract—Question of law.

A contract entered into between the plaintiffs and defendants for the purchase of some wheat contained the following clause : “Should any dispute arise, the same should be submitted for settlement to the arbitration of two London corn factors respectively chosen, whose decision shall be final and binding :” *Held*, that the clause in question formed part of the consideration for the contract, and was intended to include questions of law as well as of fact which might arise upon the construction of the contract. *Forwood v. Watney*, 49 L.J. Q.B. 447. P

(9) Submission of matters not within submission.

Where an arbitrator has, by agreement of the parties, jurisdiction to determine disputes which may arise as to certain matters specified in the agreement, and the parties submit to him for adjudication matters not within his jurisdiction, both the arbitrator and the parties being under the misapprehension that the matters so submitted are within his jurisdiction, the award of the arbitrator is good. *Thames Iron Works and Shipbuilding Co. v. Reg.*, 10 B. & S. 33=20 L.T. 318. Q

(10) Clause in submission excluding power of Court to remit matters.

A submission contained a clause that, “in case of any motion to set aside the award,” the Court may remit the matters referred : *Held*, that such clause did not exclude the general power of the Court to remit the matters. *Morris v. Morris*, 6 El. & Bl. 383=25 L.J. Q.B. 261=2 Jur. 542=4 W. R. 549. R

(11) Determining quantum of compensation.

Where arbitrators were appointed to determine the “quantum” of compensation to be given for yielding up possession of a lease, it was held to be a mere valuation and not a submission heretunder. *Re Hammond, &c. Arb.*, 62 L.T. 808 ; *Re Hopper*, L.R. 2 Q.B. 867 ; *Re Carus Wilson*, 18 Q.B.D. 7 ; *Re Dawdy*, 15 Q.B.D. 426. S

3.—“*Present or future differences*”—(Concluded).

C.—Construction of submission—(Concluded).

(12) Intention to deprive legal right.

If it is intended that the parties to a submission are to be deprived of any legal right they may have the submission should so state. See *Green and Balfour's Arb.*, 63 L.T. 97, 325. T

(13) Plea of limitation.

A submission to arbitration did not debar a party thereto from raising as a defence the Statute of Limitations. (*Re Astly, &c., Co. and Tyldesley Coal Co. Arb.*, 80 L.T. 116). U

4.—“*To arbitration.*”

(1) Arbitration and Valuation—Distinction.

The distinction between an arbitration and a valuation still holds good. The former is to settle a difference which has arisen between the parties, the latter is agreed upon to prevent any difference arising. *Russel*, 9th Ed., p. 44. V

(2) Where a judicial inquiry is intended, there is a reference to arbitration.

Where, from the terms of an agreement for the settlement of disputes, it appears that the parties intended that there should be an inquiry in the nature of a judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence, there is a reference to arbitration. *Hopper, In re*, L.R. 2 Q.B. 367=36 L.J.Q.B. 97; *Carus Wilson v. Green*, 18 Q.B.D. 7; *Per Lord Esher, M.R.*, at p. 9. W

(3) Preventing differences arising.

A decision precluding differences from arising, instead of settling them after they have arisen, is not an award. *Russell*, 9th Ed., p. 44. X

(4) Valuer not arbitrator.

(a) Where a contract for the sale of an estate provided that the timber should be taken at a valuation, each party to appoint his own valuer, and that the parties should, in case of difference, appoint an umpire, it was held that the Court had no jurisdiction to set aside such umpire's valuation, the umpire being merely a valuer and not an arbitrator. *Carus Wilson and Green, In re*, 18 Q.B.D. 7=56 L.J.Q.B. 530. Y

(b) In *Chambers v. Goldthorpe*, (1901) 1 K.B. 624 at p. 635, however, A.L. Smith, M.R., said: “It was argued that there was no dispute between the parties prior to the plaintiff giving his certificate, and that, unless there was a dispute, the plaintiff could not be in the position of an arbitrator. I do not see why there should not be an arbitration to settle matters, as to which, even if there was no actual dispute, there would probably be a dispute unless they were so settled.” Y-1

(5) Building agreement—Architect—Arbitrator.

(a) A building agreement, authorising proceedings in case of certain defaults by the builder, to be ascertained and decided on by the architect, without appeal, is not a submission to arbitration. *Wadsworth v. Smith*, L.R. 6 Q.B. 332=40 L.J.Q.B. 118. Z

(b) Where a building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after

4.—“To arbitration”—(Continued).

their completion, upon certificates of the architect, and that a certificate of the architect, showing the final balance due to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance, the Court of Appeal (Romer, L.J., dissenting) held that the architect, in ascertaining the amount due to the contractor, and certifying for the same under the contract, occupied the position of an arbitrator. *Chambers v. Goldthorpe*, (1901) 1 K.B. 624=70 L.J.K.B. 452.

- (c) The effect of the decision in this case would seem to be that, where there is a contract in terms similar to the one then before the Court, the contract constitutes a submission of reference to the architect within the meaning of the Act. *Russell*, 9th Ed., p. 45. B

(6) Finality of the architect's certificate.

In a later case, where the contract contained provisions somewhat similar to those in the preceding case, the Court of Appeal held that the clause as to arbitration destroyed the finality of the certificates, and that, in an action by the contractor against the building owner to recover sums due on certificates issued by the architect, the defendant was entitled to set up, by way of defense and counter claim, that the work done and materials supplied were defective and unsuitable, and not in accordance with the terms of the contract. *Robins v. Goddard*, (1905) 1 K.B. 294=74 L.J. K.B. 167. G

(7) Steward of horse-race.

Stewards of horse-race appointed to settle any disputes respecting it are not arbitrators in the strict sense. *Ellis v. Hopper*, 28 L.J. Ex. 1; *Parr v. Winteringham*, 1 E. & E. 394=28 L.J.Q.B. 128. D

(8) Where fixing value by arbitrator is not of the essence of agreement.

- (a) When two partners made an agreement containing a provision that, on the determination of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership was carried on for some time under the agreement: Held, that, though the valuation could not be so made because no umpire was provided, a Court of equity would carry the partnership agreement into effect by ascertaining the value of the share. *Dinham v. Bradford*, L.R. 5 Ch. 519. E

- (b) Where the fixing of a value by arbitrators is not of the essence of the agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value. (*Ibid.*) F

(9) Selling broker employed as arbitrator to determine quality.

A broker made a contract for the seller as follows:—“Oct. 26, 1869. Sold by order and for account of Mr. P., to my principals Messrs. S.H. & Son, to arrive, 500 tons black smyrna raisins, 1869 growth, fair average quality in opinion of selling broker, to be delivered here in London at 22s. per owt. Shipment November or December, 1869”: Held, that the broker was employed as an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract. *Pappa v. Rose*, 41 L.J.C.P. 11=L.R. 7 C.P. 32 =20 W.R. 62. Affirmed on appeal, 41 L.J. C.P. 187=L.R. 7 C.P. 525 =27 L.T. 348=20 W.R. 784. G

4.—“*To arbitration*”—(Concluded).

(10) Fixing sale price by valuers.

An agreement for the sale of property at a price to be fixed by two valuers and an umpire is not a submission to arbitration. *Turner v. Goulden*, 43 L.J. C.P. 60=L.R. 9 C.P. 57; *Collins v. Collins*, 26 Beav. 306=28 L.J. Ch. 184=5 Jur. 30=7 W.R. 115; see *Bottomley v. Ambler*, 38 L.T. 545=26 W.R. 566. H

5.—“*Named.*”

(1) Agreement providing for appointment in a particular manner.

Where the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the referees were named in the clause itself. And an award made by such referees will be summarily enforced. *Haddan and Roufelli, In re*, 9 C.B.N.S. 683; *Newton v. Heiherington*, 19 C.B.N.S. 342. I

(2) Form of appointment.

(a) APPOINTMENT NEED NOT REFER TO MATTERS IN DIFFERENCE.

When arbitrators are to be named after disputes shall have arisen, if the party says, “I appoint A.B., as the arbitrator on my behalf,” pursuant to the agreement (describing it), it is sufficient. The appointment need not recite nor refer to the matters in difference. *Russell*, 9th Ed., p. 60. J

(b) APPOINTMENT BY PARTY AND STRANGER.

If the appointment be made by the party and a stranger “jointly,” it would seem to be bad, though if the stranger joins in the appointment, and it is expressed to be made by the two severally, the addition of the stranger does no harm. (*Ibid.*) K

(3) Arbitrator cannot be appointed by will.

A testator cannot make a valid appointment by will, that, if any differences should arise respecting his will, these shall be determined by a specified arbitrator, whose decision is to be final. *Philips v. Bury, Skin.* 447. L

(4) Irregularity or defect in appointment of arbitrators.

Any irregularity or defect in the appointment of the arbitrators cannot be cured by the waiver implied from the act of the party contesting the reference, in going on before the arbitrators and taking his chance of a favourable decision, and such party cannot be held to have forfeited his right to question the validity of the reference and the award by reason of his having taken part in the proceedings forced upon him. 10 M.I.A. 418. M

Submission to be irrevocable except by leave of Court. 5. A submission ^{1.} unless a different intention is expressed therein, shall be irrevocable ^{2.} except by leave of the Court ^{3.}

(NOTES).

Corresponding English Law.

This corresponds to section I of the English Arbitration Act, 1899, 53 and 53 Vict., c. 49. N

1.—“Submission.”

(1) Essential part of submission.

The essential part of a submission in its active operation, is the giving of authority to a named arbitrator. In practice a “submission” is frequently included in commercial contracts, and on differences arising, a second document, commonly called the reference, is drawn up defining the dispute and conferring the authority of an arbitrator on a specified person. 4 S.L.R. 14 (16). 0

(2) Effect of submission—Whether Court's jurisdiction ousted.

- (a) Agreements or covenants, that, in case of disputes between the parties, all matters in difference shall be referred to arbitration, do not oust the courts of law or equity of their jurisdiction. *Thompson v. Charnock*, 8 Term Rep. 189; *S. P. Mitchell v. Harris*, 2 Ves. Jun. 133; *Street v. Rigby*, 6 Ves. 822; *Nichols v. Chalie*, 14 Ves. 270. P
- (b) It is a principle of law that parties cannot by contract oust the Courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. *Scott v. Avery*, 25 L.J. Ex. 303=5 H.L.C. 811=2 Jur. 815=4 W.R. 746. Q
- (c) The effect of making a submission a rule of Court is to render any misconduct under the submission or any refusal to act on the award a contempt of that Court and to give that Court jurisdiction over the award and the parties to the submission. *Per Blackburn, J.*, in *Duke of Buccleugh v. Metropolitan Bd. of Works*, L.R. 5 Ex., p. 280. R

(3) Agreement to refer, whether binds the legal representative of a deceased party.

Whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration depends upon the nature of the right which forms the subject-matter of the reference; that is, upon the question, whether the right is purely personal or survives to the legal representative. 14 C.L.J. 188. S

(4) Legal representative proceeding with investigation.

If, upon the death of a party to arbitration proceedings, his representative in interest becomes a party thereto and proceeds with the investigation, the award is binding upon him. 14 C.L.J. 188. T

(5) When award condition precedent to action.

A policy of fire insurance provided that any difference as to the amount payable under it in respect of any alleged loss or damage by fire should be referred to arbitration, and that “the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy:” Held, that the obtaining an award was condition precedent to a right of action by the insured. *Scott v. Avery*, 5 H.L.C. 811; *Caledonian Insurance Co., Gilmour*, A.C. 85=1 R. 110. U

2.—“Shall be irrevocable.”

(1) ‘Irrevocable,’ meaning.

- (a) The words “a submission shall be irrevocable” mean that the power of the arbitrator cannot be revoked when he has once been appointed; they do not mean that the agreement to refer cannot be revoked, because that always was irrevocable. *Smith and Service, In re*, 25 Q.B.D. 545=59 L.J.Q.B. 593. V

2.—“ Shall be irrevocable ”—(Continued).

- (b) The words “ a submission shall be irrevocable ” only mean “ not revocable by any party.” See Russell, 9th Ed., 129. W
- (c) An agreement is, by its very nature, irrevocable ; the word “ revoke ” is wholly inappropriate to the process by which the contractual obligations created by an agreement are made to lose their binding effect. 4 S.L.R. 14. X

(2) Party cannot resile back from reference.

Where parties agree to refer their dispute to the decision of an arbitrator, they ought not to be allowed to resile from the position which they took up at the time of the reference and objections which are merely technical and not objections of substance should not be allowed to prevail so as to disturb an award, which has been fairly made, and which, when the real nature of the dispute between the parties is looked to, might reasonably be considered as directed to a decision on the matters which were in dispute. 15 Ind. Cas. 321. Y

(3) Submission not revocable without just cause.

- (a) The submission of an existing dispute, once validly made, is not revocable without just and sufficient cause, even in the case of a submission which has not been made a rule of Court. 14 C.L.J. 188; 27 M. 112; 7 C.W.N. colli; 20 A. 145; 17 B. 129; 8 M.H.C. 46; 12 M.I.A. 112; 9 P.R. 1870; 7 A. 273; 17 O. 200; 15 W.R. 331; Oudh S.C. 17. Z
- (b) A party to a reference to an arbitration cannot revoke it except for good cause as it stands on the same footing as all other lawful agreement. Whatever might have been the old English Common Law the Privy Council in *Pestonjee Nussurwanjee v. Manockjee & Co.* (12 M.I.A. 112 at p. 130) practically treated that law as obsolete and have ruled that reference to arbitration “ stand on the same footing as all other lawful agreements from which the party cannot retire ” except for good cause. (1914) M.W.N. 52. See, also, 29 A. 18. Z-1
- (c) A party cannot resile from a reference to arbitration at his sweet-will and pleasure, and it cannot avail him to show that having once agreed to the reference he afterwards repented of his action. 17 O.C. 386. Z-2
- (d) A proposal or an acceptance may be revoked under certain circumstances, but once the contractual obligation is created, it cannot be severed at the will of one party. 4 S.L.R. 14. A
- (e) An arbitrator is, in law, a mere mandatory ; he acts by virtue of the authority given to him by the parties, as an agent for a principal. By the common law of England any mandate can be revoked, and the authority of an arbitrator could be revoked under the same circumstances as could the authority of an ordinary agent. It was in this sense and this sense only that a submission to arbitration was revocable under the common law. See *Randell v. Thompson*, (1 Q.B.D. 748, pp. 757, 758; *Re Rouse and Meier*, L.R. 6 C.P. 212; *Fraser v. Ehrenspurger*, 12 Q.B.D. 310; *Dentische Springstof, Action v. Briscoe*, 20 Q.B.D. 177; p. 180; and *In re Smith and Service*, 25 Q.B.D. 310. 4 S.L.R. 14 (16). B
- (f) The circumstances under which the authority of an agent is revoked are given in S. 201, Indian Contract Act, and if the terms of that section be compared with the section in Russell on awards headed “ Of revoking the

2.—“Shall be irrevocable”—(Continued).

arbitrators' authority," it will be found that the former represents with fair accuracy the old common law as to the revocation of a submission. 4 S.L.R. 14. G

- (g) As early as 1868 it was pointed out by Lord Romily in the case of *Pestonji Nusserwanji v. Manockjee*, 12 M.I.A. 119 at pp. 180, 181, "that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. (*Ibid.*) D
- (h) This Act states in the clearest possible terms that a submission, unless a different intention is expressed therein, shall be irrevocable, except by leave of the Court. The Courts of this Country have no traditional prejudice against domestic tribunals, and no sacred principle is outraged by carrying out the intention of the legislature; that intention clearly was to definitely and thoroughly complete the task at which the legislature both in England and in this country had so long been labouring—"to put an agreement to refer on the same footing as all the agreements;... to put an end to the distinction between the agreement to refer and the authority thereby conferred." (*Ibid.*) E

Grounds for revocation.

(1) Question of law involved.

Where a contract contained a clause that, if any disputes arose, they should be referred to two corn factors, and a question of law arose, the Court refused to allow a revocation, saying that the arbitration clause was meant to cover questions of law as well as of fact. *Forwood v. Watney*, 49 L.J. Q.B. 447. F

(2) Arbitrator making mistake of law.

(a) Where parties have agreed to refer questions in dispute between them to arbitration, the mere fact that the arbitrator in the course of the proceedings is making a mistake of law in a matter of law within his jurisdiction does not entitle the party dissatisfied with the arbitrator's view to come to the Court and claim as of right leave to revoke the submission. There is power to give leave to revoke the submission in such a case which may be exercised under exceptional circumstances, but it is a matter of discretion depending on the circumstances of the particular case. *East and West India Docks Co. v. Kirk*, 12 App. Cas. 738; *James v. James*, 58 L.J. Q.B. 424=28 Q.B.D. 12=61 L.T. 310=37 W.R. 600. G

(b) The Court of Exchequer in one case intimated that, if an arbitrator, to whom an action of debt is referred, received evidence of a claim for damages for breach of a covenant, as recoverable in the action, notwithstanding that the defendant objected that such damages are not claimable as a debt, the

2.—“*Shall be Irrevocable*”—(Continued).

Grounds for revocation—(Continued).

defendant might properly apply for leave to revoke, since the award would be conclusive against him that it was a debt. *Faviel v. Eastern Counties Rail Co.*, 2 Ex. 344=17 L.J. Ex. 297. H

(3) Improper reception of evidence.

If evidence is admitted by an arbitrator in respect of matters beyond his jurisdiction, leave to revoke will be given. *Gerard (Lord) and London & North Western Railway Co. In re*, (1895) 1 Q.B. 459=64 L.J. Q.B. 260; (on appeal from [1894] 2 Q.B. 915) referred to in 10 Bom. L.R. 361. I

(4) Reception of evidence behind the back of a party.

If an arbitrator behind the back of a party receive evidence against him, the evil is not cured by the arbitrator informing him of it, and offering to rehear the witness in his presence; but the party may decline to accede to the proposition, and may properly apply to have the arbitration stopped, for he cannot tell what impression that the witness has already said may have made, and cannot feel sure that what he might afterwards say would remove it. *Drew v. Drew*, 2 Macq. 1. J

(5) Arbitrator willing to receive evidence wrongly rejected.

Though the Court be of opinion that an arbitrator has wrongly rejected admissible evidence, and that therefore the application for leave to revoke was a proper one, it will permit the reference to go on, if it be satisfied that, on hearing the opinion of the Court, the arbitrator will receive the evidence which he has rejected before. *Hart v. Duke*, 32 L.J. Q.B. 55; *Robinson v. Davies*, 5 Q.B.D. 26. K

(6) Excess of authority by arbitrator.

In an arbitration to ascertain the total amount of loss from fire to a Mill, the arbitrators cannot be said to exceed their authority in allowing the owner to give evidence to prove that the machinery was seriously injured not only by the fire but by the act of the Insurance Company in allowing the water used to extinguish the fire to lie on the machinery while the Company was in possession of the Mill; and the submission cannot be revoked upon this ground. 13 M.L.T. 11 (P.C.)=11 A.L.J. 42=(1913) M.W.N. 61=15 Bom. L.R. 19=17 C.W.N. 269=17 C.L.J. 154. L

(7) Corruption of arbitrator.

Corruption in an arbitrator is a good ground for revoking the submission. *Drew v. Drew*, 2 Macq. 1. M

(8) Collusion of arbitrator.

Where the arbitrator is in fraudulent collusion with one party, the submission can be revoked. 29 A. 13=3 A.L.J. 613=A.W.N. (1906) 253. N

(9) Arbitrator, am-muktear of one of the parties.

If after a reference it transpires that the arbitrator has been acting as am-muktear of one of the parties without remuneration, the other party can withdraw from the reference. 29 C. 278=6 C.W.N. 235. O

(10) Arbitrator's indebtedness to a party.

Where an arbitrator, being indebted to one of the parties at the time of the reference, or becoming so indebted after the reference, fails, in either case,

2.—“*Shall be irrevocable*”—(Continued).

Grounds for revocation—(Continued).

to disclose the fact to the other party, such party is entitled to revoke the reference on discovery of the fact. 29 C. 278=6 C.W.N. 235; see 3 C.W.N. 361; 25 C. 141. P

(11) Long and unreasonable delay of a party to prosecute proceedings.

Where there is a long, unexplained and unreasonable delay on the part of a party to prosecute proceedings before the arbitrator, and the other party did not concur to it or consent to it, the latter is, *prima facie*, entitled to decline to go on with the reference and to insist on revoking the agreement to refer to arbitration. 17 C. 200. Q

(12) Bankruptcy of a party.

(a) Bankruptcy of one of the parties to an arbitration, during the course of the arbitration, and before the making of the award, does not operate as a revocation of the submission. *Edwards, Ex parte, Smith, In re*, 8 Morrell 179. R

(b) In one case it was decided that the bankruptcy of one party justified his opponent in revoking the submission. *Marsh v. Wood*, 9 B. and C. 659=7 L.J. (O.C.) K.B. 327. S

(c) And it would probably be now considered by the Court as a good ground for allowing a revocation. See *Gaffney v. Killen*, 12 Ir. C. L. Rep. App. xxv. T

(13) Death of a party.

(i) WHERE THE INTENTION IS TO BIND REPRESENTATIVES IN INTEREST.

(a) The rule of the English common law that a submission to arbitration stands revoked by the death of one of the parties, is not applicable to this country. The test to be applied here is, what is the true nature of the submission? Were the matters in difference personal questions in respect whereof it was not intended that the successors in interest of the parties should be affected by the decision of the arbitrators? If the intention of the parties was that not merely themselves but their representatives in interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties. 15 C.L.J. 360 (368) (27 M. 112, R.) U

(b) In such a case, if the hearing was not completed, the representatives of the deceased party should be brought on the record and be made parties to the submission. 15 C.L.J. 360 (361). V

(c) In Morrison's edition of the Indian Arbitration Act, p. 7, it is stated “it is a general rule that, if one of the parties to an arbitration dies before award is made, the submission is revoked,” and there are passages, both in Redman (pp. 106, 107), and in Russell (8th Ed., p. 114) which seem to support this view of the law. 4 S.L.R. 14 (15). W

(d) In 4 S.L.R. 14 the plaintiff applied for appointment of an arbitrator under S. 8 of the Act, to settle differences arising out of an indent. The indent was signed by a representative of the defendant's firm and contained a clause providing for submission of future differences to an arbitrator to be appointed by the parties. The defendants contended that one of their partners died since the signing of the indent and that consequently the submission clause was rendered ineffective. Held that S. 5 of the Act has

2.—“*Shall be irrevocable*”—(Continued).

Grounds for revocation—(Continued).

laid down the general rule that a reference was irrevocable unless with the permission of the Court, and that the Act contains no provision to justify treating the death of a party as an exception to this rule. X

(ii) PARTIES WITH SEVERED INTERESTS—DEATH OF ONE.

Where one submission includes several parties on the same side, who have each of them separate interests, the death of one avoids the submission only as to him. Russell, 9th Ed., 190. X-1

(iii) DEATH OF INFANT—REVOCATION AS TO GUARDIAN.

In *Briston v. Binns*, 3 D and R, 184, the Court practically treated the death of an infant as a revocation of a submission, so far as it affected parties who were his guardians and trustees. They had joined in a reference affecting lands, of which the infant was tenant for life. He died pending the reference. An award made against the trustees after his death was, on application to the Court, set aside so far as it related to them. X-2

(iv) STIPULATION TO PREVENT DEATH FROM BEING A REVOCATION.

To avoid the inconvenience which resulted from death being a revocation, it is customary for the parties to insert a clause in the submission providing that the death of either or any of them should not revoke the authority of the arbitrator, and that the award, in case of a death, should be delivered to the personal representative. See Russell, 9th Ed., p. 190. Y

(v) DEATH OF A PARTY AFTER SUBMISSION IS MADE A RULE OF COURT.

Where a submission to arbitration has been made a rule of Court, the death of one of the parties does not work a revocation. 14 C.W.N. 759=6 Ind. Cas. 170. Z

(vi) ENQUIRY BY ARBITRATOR FINISHED—ARGUMENTS HEARD—SUBSEQUENT DEATH OF A PARTY.

Where, an agreement to refer having been filed in Court, the Court appointed an arbitrator, who, after finishing his enquiries, and hearing the arguments of the pleaders of the parties, reserved his report and award, and then one of the parties died; *held*—that, under the circumstances of the case, the death of a party did not make the award void, and the doctrine of *nunc pro tunc* was applicable as in the case of a judgment of Court. 14 C.W.N. 759=6 Ind. Cas. 170. A

(14) Umpire improperly appointed by lot.

A discovery that an umpire has improperly been appointed by lot is a good ground for revocation. *The European and American Steam Shipping Co. v. Croskey*, 8 C.B.N.S. 397=29 L.J.C.P. 155. B

(15) Agreement for reference not completed.

Parties can withdraw from a reference to arbitration, when there has not been a completed agreement for reference, for instance, when it is not yet settled upon what terms as to remuneration the nominated arbitrator is to act. 10 C.L.J. 449=4 Ind. Cas. 370. C

(16) Jurisdiction of arbitrator to allow amendment of points of claim and defence.

The insured and the insurance company, agreed to refer all matters of difference between them under the policy to the award of an arbitrator. Upon the

2.—“*Shall be irrevocable*”—(Concluded).

Grounds for revocation—(Concluded).

matter coming before the arbitrator, the insurance company at once intimated that they desired to amend their points of defence by adding thereto a new ground of defence to the claim based upon a condition in the policy. *Held*—that the points of claim and defence, being in the nature of pleadings, could be amended by the arbitrator at his discretion; and that, after the parties had submitted their points of claim and defence, the arbitrator was not bound to admit any new ground of defence, but had a discretion, to be exercised judicially, either to allow or refuse to allow the new ground of defence to be added. *Edward Loyd Ld. v. Sturgeon Falls Pulp, Co. Ld.*, (1901) 85 L.T. 162. *In re Arbitration between Brighton and Law Car and General Insurance Corporation, Ld.*, (1910) 9 K.B. 738=80 L.J.K.B. 49=108 L.T. 62. D

N.B.—For other cases of revocation, see notes under rule I, Sch. II, C.P.C., 1908, *infra*.

3.—“Leave of the Court.”

(1) Leave to revoke to be sparingly granted.

The discretion of the Court in granting leave to revoke a submission will be exercised in the most sparing and cautious manner. *Scott v. Van Sandan*, 1 Q.B. 102; *Wilson v. Morel*, 15 C.B. 720. E

(2) Discretion of Court.

(a) The matter of granting leave for revocation of submission is one entirely for the discretion of the Court. *Russel* (9th Ed.), 125. F

(b) In the case of the *East and West India Dock Co. v. Kirk and Pendall*, 12 App. Cas. 788, the House of Lords held that the Court has power to give leave to revoke a submission where it appears that the arbitrator is going wrong in point of law even in a matter within his jurisdiction, and in this case the House of Lords reversing the decision of the Divisional Court and the Court of Appeal was prepared to exercise that power unless the parties agreed to the arbitrator raising the questions in a special case for the opinion of the Court. F-1

(c) In *James v. James and Bendall*, (1889) 23 Q.B.D. 12, Lord Justice Lindley says:—“I have no doubt that we have power to grant leave to revoke the submission, but I also have no doubt that it is a matter of discretion whether we would do so, and therefore the real question seems to me to be whether the facts of the particular case are such as to render it right for us in the exercise of that discretion to grant such leave.” (Cited in 10 Bom. L.R. 362). G

(d) Lord Denman C.J., in delivering the Judgment of the Court in *Scott v. Van Sandan*, (1841) 1 Q.B. 102, makes some very weighty observations. After observing that submissions to arbitration were “highly advantageous to the ends of justice” and that when “resorted to on proper occasions the jurisdiction was of inestimable value.” He says:—

“We will only observe that the discretion of the Court to which the appeal is made ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of the strife, should only open the flood-gates for multiplied expenses and interminable delays.”

3.—“Leave of the Court”—(Concluded).

- (e) The power to grant leave to revoke a submission is exercised by the Court in a sparing and cautious manner, and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke.” Halsbury’s Laws of England, Vol. I, p. 449; See, also, 10 Bom. L.R. 351 (352). H
- (3) Leave to revoke submission to arbitration—Procedure.
The proper procedure to be followed in moving for leave to revoke a submission should be by motion in Court. 10 Bom. L.R. 351. I
- (4) Several agreements to refer differences to arbitration—One application to revoke submission in all the cases.

Where there are more agreements than one between the parties to refer their differences to arbitration, and the evidence recorded by the arbitrators in one of them is by consent to be treated as evidence in all the submissions, but there is no order consolidating the reference, and there is no consent anywhere that the different references should be treated as one, it is not competent to any party to seek to revoke the submission to arbitration in all the different cases, by one application alone. 10 Bom. L.R. 351 (352). J

(5) Application for revocation when should be made.

Application for leave to revoke should be made before the award is executed, and will not be granted *ex parte*. *Clarke v. Stocken*, 5 Dowl. 32=5 L.J. (N.S.) C.P. 190. K

(6) Arbitration Clause in Charter-party—Injunction to restrain arbitration—Revocation of submission—Discretion of Court.

A dispute having arisen between M. & Co., and the plaintiffs, M. & Co. gave notice that they demanded an arbitration under a clause in a charter-party, which provided “for arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third,” and formally required the plaintiffs within seven clear days to appoint their arbitrator. The plaintiffs did not appoint an arbitrator, and M. & Co., after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator. The plaintiffs thereupon took out a summons for further directions, asking (*inter alia*) for an injunction to restrain M. & Co., from proceeding with the arbitration, alternatively that leave be given to the plaintiffs to revoke the submission to arbitration. Held—that there was no jurisdiction in the Court to grant the injunction asked for; and that, in the exercise of its discretion, the Court ought not to give leave to revoke the submission. “*Den of Airlie*” Co., Ltd. v. *Mitsui & Co., Ltd., and British Oil and Cake Mills, Ltd.*, 106 L.T. 451; 17 Com. Cas. 116. L

6. A submission, unless a different intention is expressed therein,

¹ Provisions implied in submissions shall be deemed to include the provisions set forth in the first schedule, in so far as they are applicable to the reference under submission.

(NOTE).

Corresponding English Law.

This section corresponds to S. 2 of the English Arbitration Act, 1893, 52 & 53 Vic. C, 49. M

[I.—“*Provisions implied in submissions.*”]

Submission prior to Act.

The provisions in the schedule are to be implied in a submission made before the commencement of the Act. *Williams and Stepney, In re*, 60 L.J. Q.B. 696=2 Q.B. 257=65 L.T. 208=89 W.R. 538. N

Reference to arbitrator to be appointed by third person. 7. The parties to a submission may agree¹ that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

2 Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce.

(NOTES).

Corresponding English Law.

This section corresponds to S. 3 of the English Arbitration Act, 1889, 52 and 53 Vic. C. 49. O

Analogous Indian Law.

Compare (i) Rule 2 of sch. II of Civil Procedure Code, 1903, *infra*. P

(ii) The Punjab Land Revenue Act XVII of 1887, S. 129. Q

I.—“*May agree.*”

Acceptance of office.

Acceptance of the office by the arbitrator seems necessary to perfect the appointment. *Ringland v. Lowndes*, 15 C.B.N.S. 178=38 L.J.C.P. 25. R

2.—“*Such person....appointment.*”

(1) **Fluctuating body.**

A fluctuating body may be appointed arbitrators. *Rathven Parish v. Elgin Parish*, L.R. 2 H.L. 585. S

(2) **A trade association.**

A reference may be made to the committee of a trade association. *Keighley, Maxsted & Co., In re*, (1893) 1 Q.B. 405; 62 L.J.Q.B. 105. T

(3) **Power of arbitrator to delegate.**

(i) **REFERENCE TO A BODY OF PERSONS WHO CAN SIT AS A TRIBUNAL.**

Where a dispute is referred to the award of a body of persons, who can sit as a tribunal, then the arbitrators are not entitled to delegate their power to individuals. 38 C. 1173. U

(ii) **REFERENCE TO A FLUCTUATING BODY WHO CANNOT SIT AS A TRIBUNAL.**

(a) But where a dispute is referred to an association consisting of a large and fluctuating body of persons, who *cannot* sit as a tribunal, it must be

2.—“*Such person....appointment*”—(Concluded).

taken that the parties intend that that body shall carry out the arbitration in the only way in which it is possible to do so, *viz.*, by individuals selected for that purpose. 33 C. 1173. V

- (b) “It appears to me to involve an absurdity to say that, when the parties have made an agreement to refer their disputes to the arbitration of the Bengal Chamber of Commerce, they expect that body to dispose of the dispute by the whole of their members, instead of by persons chosen to that end. In my opinion, it was within the power of the Bengal Chamber of Commerce to appoint persons to act as arbitrators, because the object for which, amongst others, the association was established, *viz.*, the settlement of disputes by arbitration can only be carried out by the association acting through individuals chosen to conduct the arbitration.” *Per* Harington, J., in 33 C. 1173. W

N.B.—For other cases of delegation of authority by arbitrator, see notes under S. 11, *infra*. X

Power for the
Court in certain
cases to appoint an
arbitrator, umpire
or third arbitrator.

8. (1) In any of the following cases:—

- (a) ¹ where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
- (b) if an appointed arbitrator neglects or refuses to act ², or is incapable of acting, or dies ³, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;
- (c) ⁴ where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him;
- (d) where an appointed umpire or third arbitrator refuses to act ⁵, or is incapable of acting ⁶, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing ⁷ an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint ⁸ an arbitrator, umpire or third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties ⁹.

(NOTES).

Corresponding English Law.

This section corresponds to S. 5 of the English Arbitration Act, 1899, 52 & 53 Vic. C. 49. Y

Analogous provisions in the Indian Law.

Compare (i) the Code of Civil Procedure, Act V of 1908, Sch. II, R. 5. Z
(ii) The Punjab Land Revenue Act (XVII of 1887), Ss. 130, 131. A

1.—“Clause (a).”

(1) Meaning of cl. (a) and cl. (b).

The true meaning of cl. (a) and cl. (b) of this section is that, where the parties will not appoint an arbitrator, or an appointed arbitrator refuses to act, or is incapable of acting, or dies, and there is no machinery in the submission whereby an appointment can be obtained, then the Court may appoint an arbitrator. *Per A. L. Smith, J.* in *Wilson and Eastern Counties Navigation & Co., In re* (1892) 1 Q.B. 81 (84). B

2.—“Refuses to act.”

(1) Arbitrator objecting to act unless appointed by Judge's order.

An arbitrator does not refuse to act within the meaning of S. 8 (b), because he objects to act unless he is appointed by a Judge's order. *Wilson and Eastern Counties Navigation & Co., In re* (1892), 1 Q.B. 81=61 L.J.Q.B. 237. C

3.—“Dies.”

Death of party before appointment of arbitrator.

P. and S. agreed to refer all disputes to arbitration, each party was to appoint an arbitrator on being called upon to do so; before arbitrators were appointed, S. died. His executor refused to appoint an arbitrator, and on application to a Judge at chambers he likewise refused to do so, and on appeal it was held that such refusal was right, as there had been no breach of the agreement to refer *Re An Arbitration*, 2 Times Rep. 150. D

4.—“Clause (c).”

(1) Award before appointing a third arbitrator.

If two arbitrators only are appointed by the submission, and they are to choose a third to act with them, and an award made by any two is to be valid, they must choose their colleagues before they take any step in the reference, in order that the parties may have the benefit of the judgment of all three on the whole of the matters. They have no business to treat the third arbitrator as an umpire to be called in in case of difference, except by consent of the parties. *Peterson v. Ayre*, 14 C.B. 665=28 L.J. C.P. 129. E

(2) Enlargement of time before appointing a third arbitrator.

If the award is to be made on or before a certain day, or such other day as the said arbitrators, or any two of them, shall appoint, it is necessary for the two to appoint a third before they make any enlargement of the time, or the enlargement will be void. *Reads v. Dutton*, 2 M. & W. 69. F

4.—“Clause (c)”—(Continued).

(3) Absence of one arbitrator at formal meeting.

- (a) It is irregular for two arbitrators to meet without notice to the third; but it is not a sufficient ground to set aside the award, when the substance was settled in his presence. *Goodman v. Sayers*, 2 Jac. & Walk. 261=22 R. R. 112. G
- (b) Under such submission it will be sufficient for any two of them to act jointly, though the third absent himself from the meetings, provided he have full notice and opportunity of being present at the meetings if he please, and be not kept away by any practice of the arbitrators or of the parties. *Goodman v. Sayers*, 2 J. & W. 249; *Dalling v. Matchett, Willes*, 215; *Monsley v. Simpson*, L.R. 16 Eq. 226; 42 L.J. Ch. 789. H
- (c) The two arbitrators must take the opinion of the third, but if after discussion he refuse to concur with them in the award, they may then execute it. *White v. Sharp*, 12 M. & W. 712=18 L.J. Ex. 215; *Sallows v. Girling*, Cro. Jac. 277; *Berry v. Perry*, 3 Bulst. 62; *Perring and Keymer, In re*, 3 A. & E. 245. I

(3-a) Absence of one arbitrator at hearing, effect of.

Where the arbitrators, although prompted by the best motives, dispensed with the presence of the head arbitrator at the first sitting when some of the witnesses were examined and the examination of the witnesses was not conducted in the presence of the parties and where the substance of the evidence was communicated to the head arbitrator and his opinion was obtained on the merits of the case without giving the parties an opportunity of presenting their respective cases before all the arbitrators:

Held, that the action of the arbitrators was improper and that the award could not be sustained. 30 Ind. Cas. 384 (385). J

(4) Award by two without consulting the third.

Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, and without finally consulting the third, cannot be supported. *Beck and Jackson, In re*, 1 C.B. 695. J-1

(5) All arbitrators should consult together upon the award.

When the two originally named arbitrators, having differed about some items, agreed each to furnish the third with a written statement of what he thought the award should be, and another award was made by the third and the one whose views he adopted, without any further meeting of all three, the Court set the award aside because the three never consulted together upon it; the one whose views were rejected being entitled to the opportunity of discussing the award with the other two. *Templeman and Reed, In re*, 9 Dowl. 962. K

(6) Exclusion of one arbitrator by fraud.

If a submission is to three, and two by fraud or force exclude the other, that alone is sufficient to vitiate the award. *Barton v. Knight*, 2 Vern 514. L

(7) Lay arbitrators leaving question of law to legal arbitrator.

Where there are three arbitrators, one legal and two lay, no principle of law will authorise the laymen in giving up their opinion on any question of law, which may await upon their decision, to the separate and distinct ruling of the legal arbitrator. *Little v. Newton*, 2 Scott 159=2 Man. & G. 351 =9 D.P.C. 437=10 L.J.O.P. 88. M

4.—“Clause (c)”—(Continued).

(8) Submission containing no provision for appointment of umpire.

- (a) A submission to arbitration is not bad, simply because no provision has been made therein for the appointment of an umpire in the event of difference of opinion between the arbitrators. 15 C.L.J. 360. N
- (b) The principle of *nunc pro tunc* is applicable to proceedings before arbitrators. There is no difference in principle between the cases where the reference to arbitration was filed in Court and where the whole of the proceedings before the arbitrators was upon a private submission. 15 C.L.J. 360. O

(9) Provision for appointment of umpire according to certain rules.

Where a submission provided for reference according to the rules of a trade association and such rules provided for an appeal to the appeal committee of the association, the Court of Appeal considered that the appeal committee was the umpire, and the case was therefore within the provisions of this Act. *Re Keighley & Co. and Bryan & Co., Arb.* (1898) 1 Q.B. 405. P

(10) Arbitrators appointed by Bengal Chamber of Commerce—Time and place of hearing not appointed.

Where the arbitrators appointed by the Bengal Chamber of Commerce under its Rules did not appoint a time and place for the hearing of the reference. Held, that the arbitrators failed in their duty in not doing so. 18 C.W.N. 68=1 Ind. Cas. 371. Q

(11) Provision for appointment of umpire before arbitrators enter upon reference.

If the terms of a reference provide that the umpire is to be appointed before the arbitrators enter upon the reference, the same cannot go on until such umpire is appointed, and the award of the arbitrator cannot be made a decree of the Court. 18 C.W.N. 297=36 C. 398=1 Ind. Cas. 391. R

(12) Time for appointing umpire.

(a) If a submission is that, if arbitrators do not make their award by a day named, then to abide the award of an umpire, to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for their making the award expires. *Beck v. Sargent, & Taunt.* 282. S

(b) Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire is chosen within the time limited for his umpirage. *Harding v. Walls,* 15 East, 556. And see *Doyley v. Pitslow,* 15 East, 557 (n). T

(13) Umpire chosen by lot.

(a) Where two arbitrators are empowered to appoint an umpire, such appointment must be the act of the will and judgment of the two, and must not be the result of chance or lot. *European and American Steam Shipping Co. v. Croskey,* 8 C.B. 897=29 L.J. G.P. 155; 6 Jur. 896=8 W.R. 236. *Harris v. Mitchell,* 2 Vern 456. U

(b) So where each arbitrator wrote on a paper the name of a person who was not known to the other, and the one drawn by chance was appointed umpire, the appointment was held bad. *Pescod v. Pescod,* 58 L.T. 76. V

(14) Appointment by lot assented to by parties.

The appointment by lot of an umpire will be sustained, if the parties either previously or subsequently give a clear assent to such a mode of election. *Tunno and Bird, In re,* 5 B. & Ad. 488; *Backhouse v. Taylor,* 20 L.J. Q. B. 233. See *Ford v. Jones,* 3 B. & Ad. 248. W

4.—“*Clause (c)*”—(Concluded).

(15) Nature of assent required.

That assent, however, to be binding, must be given with a full knowledge of all the circumstances. If the arbitrators merely inform the parties that they have mutually chosen A. B. to be umpire, and the parties approve of the appointment, not knowing that the umpire has been selected by lot, the umpire obtains no binding authority by such assent. *Greenwood and Titterington, In re*, 9 A. & E. 699=8 L.J. (N.S.) Q.B. 182. X

(16) Waiver of objections to appointment.

- (a) Objections to appointment of arbitrator is waived by attending before him. *Harcourt v. Ramsbottom*, 1 Jac. & Walk. 511. And see *Longman v. East*, 47 L.J. C.P. 211=3 C.P.D. 142=38 L.T. 1=26 W.R. 183. Y
- (b) Even if the arbitrators, without any authority, appoint an umpire, and he be guilty of the irregularity of examining the parties separately, his decision cannot be impeached by them, if they attend before him and make no objection. *Matson v. Trower*, 1 Ry. & Moo. 17. Z

5.—“*Refuses to act.*”

(1) Refusal of party to appoint an arbitrator.

Where a reference is to three arbitrators—one to be appointed by each of the parties, and the third to be chosen by the two so appointed—the Court has no power under this section to order a party who has refused to do so to appoint an arbitrator. *Smith and Nelson, In re*, 59 L.J., Q.B. 583=25 Q.B.D. 545=63 L.T. 475=89 W.R. 117. A

(2) Refusal of first umpire to act—Appointment of fresh umpire.

If the umpire appointed refuse to act, the arbitrators may appoint another. For though, when the arbitrators have once executed their authority by the appointment of an umpire, they cannot revoke it and execute it again, this seems to apply only to the case of an effectual appointment, and there is no effectual appointment, unless it be accepted by the person named as umpire. *Oliver v. Collins*, 11 East, 367; *Trippet v. Eyre*, 3 Lev. 268. B

(3) Appointment of umpire conditional on acceptance.

If the arbitrators make the appointment in terms conditional on acceptance, it is clear their power to make a second appointment remains, in case of a refusal by the party first selected. *Reynolds v. Gray*, 1 Salk 70. C

(4) Disapproval by parties of an effectually appointed umpire.

When there is an effectual appointment of an umpire, it cannot be affected by the disapproval of the parties. *Oliver v. Collins*, 11 East, 367. D

6.—“*Incapable of acting.*”

Arbitrator going abroad.

A submission agreed to refer to an arbitrator to be appointed by the Institute of Civil Engineers, and failing him, to some other person to be appointed by the same body. W.M. was appointed, and after making his award went abroad and thus became incapable of acting further. Subsequently a further dispute arose, and the Institute of Civil Engineers appointed S. as arbitrator; and it was held that the appointment of S. was valid. Held, further, that though S. objected to act unless appointed by an order, he

6.—“*Incapable of acting*”—(Concluded).

had not “refused to act” within this section, and that even if he had done so there was no power to make an appointment by order, the proper course being to apply to the Institute of Civil Engineers to appoint some other person. *Re Wilson & Son and Eastern Counties Navigation Co. Arbn.*, (1892) 1 Q.B. 81=8 Times Rep. 264. ■

7.—“*Written notice to concur in appointing*.”(1) *Notice to appoint*, meaning.

These words mean notice to appoint, or to concur in the appointment within seven days of an *acceptable* arbitrator. Where the notice was not worded strictly in accordance with the section, though its meaning was clear, and the party receiving it refused to concur in the appointment of any arbitrator, the Court appointed one. (*Re Eyre and Corp. of Leicester*, (1892) 1 Q.B. 186. ■

(2) *Written notice not naming arbitrator*.

A written notice given by one of the parties requiring the other party to concur in the appointment of an arbitrator was held to be a sufficient notice within the meaning of this section, although the arbitrator was not named in the notice. (*Re Eyre and Corporation of Leicester*, (1892) 1 Q.B. 186=61 L.J. Q.B. 438. ■

(3) *No nomination until notice to other party*.

Neither party can be said to have chosen an arbitrator until he has given notice of his nomination to the other party, unless such other party has refused to proceed by arbitration. *Thomas v. Fredericks*, 10 Q.B. 775=16 L.J. Q.B. 393. ■

8.—“*The Court may....appoint*.”(1) *Failure to follow procedure under the section—Jurisdiction of Court to appoint arbitrator*.

Before the Court can appoint a single arbitrator it must be satisfied that the provisions of S. 8 have been complied with, and it cannot accept, as equivalent to such compliance, a procedure appropriate to a wholly different set of circumstances and to the attainment of a result wholly different from that to which the application before it is directed. Where the provisions of S. 8 have not been followed, the Court has no jurisdiction to appoint an arbitrator. 3 S.L.R. 221. ■

(2) *Mode of appointment prescribed*.

If a particular mode of appointment is prescribed, it must be followed. *Batey v. Townley*, 1 Ex. 572=19 L.J. Ex. 896. ■

(3) *Clause providing for arbitrator's appointment within six days—Appointment before six days—Effect*.

Where a clause providing for a reference stated that “if either party shall fail to nominate an arbitrator within six days after being required to do so, the other party shall be at liberty to appoint both arbitrators, and where the reference was signed at the earliest on the sixth day—five clear days and broken portions of two other days. Held, that the time limited by the condition precedent had not elapsed, and that the plaintiffs had no power to make the appointment. The expression “within six days after

8.—“*The Court may.... appoint*”—(Continued).

an act” means so many clear days after it. A day is, generally speaking, a period from midnight to midnight and the law admits not of fractions in time but in case of necessity. 3 S.L.R. 287. K

(4) Failure to appoint Umpire—Application to Court by summons to appoint arbitrators—Other party not made respondent.

(a) Under the special jurisdiction conferred upon the Court by this section to appoint an umpire in references falling within the section, it is competent to the Court, where two arbitrators having liberty to appoint an umpire fail to comply with a notice under that section requiring them to concur in an appointment, to bring the arbitrators before it in order to ascertain their views before making an appointment, due provision being made for their costs. *Taylor v. Denny, Mott and Dickson*, (1912) A.C. 666—107 L.T. 69. L

(b) By a submission in writing a dispute between buyers and sellers was referred to arbitration, the buyers appointing J.N.L., as their arbitrator and the sellers C.T.T., as their arbitrator, and power was given to the arbitrators to name an umpire. The arbitrators failed to name an umpire. The arbitrators failed to determine the matter in dispute, and also failed to agree upon an umpire. The buyers then served the arbitrators with a written notice to appoint an umpire under this section. The arbitrators having failed to make the appointment the buyers applied to the Court by originating summons under the same section for an order that an umpire might be appointed. The summons was served on the two arbitrators, but the sellers, who were not within the jurisdiction, were not made respondents. At the hearing of the summons the affidavits which were put in dealt only with the question as to whether the umpire should be a lawyer or a timber trade expert, but counsel on behalf of C.T.T. contended that he should not have been made a respondent, and that no order should be made against him. The master made an order appointing a barrister umpire as desired by the buyers. C.T.T. appealed and asked that the order of the Master might be varied by appointing a timber trade expert as umpire. Lush, J., affirmed the order of the Master.

Held—that as a general rule a summons asking for the appointment of an umpire by the Court ought to be served on the other party to the arbitration, and not on his arbitrator, but (*hesitante Vaughan Williams, L.J.*) that upon the facts of the case the sellers’ arbitrator had so acted in the interest of the sellers throughout the proceedings that he ought not to be dismissed as a respondent to the originating summons.

Held, further, by Buckley and Kennedy, L.J.J.—that where an application is made by a party to an arbitration under this section, *ex parte*, it is competent for the Court to make an order *ex parte*, even although the other party has not been made a respondent to the application.

Held, on appeal, that the objection as to the form of the summons failed and that the arbitrators were the proper parties to bring before the Court. Ibid. M

(5) Particulars of difference need not be mentioned in the appointment.

It is not necessary in the appointment of the arbitrators to particularise the matters to be arbitrated upon. *Hadden, In re*, 9 C.B. 683, *Ibid.* N

8.—“The Court may....appoint”—(Concluded).

(6) Court cannot compel appointment.

The Court has no power to compel a party to appoint an arbitrator where no legal proceedings have been commenced. *Smith and Service, In re*, 25 Q.B.D. 445=59 L.J.Q.B. 533. See, also, *United Kingdom Mutual, etc., Association v. Houston*, (1896) 1 Q.B. 567. O

(7) Court cannot appoint where submission provides for mode of appointment.

Where the submission provides for the mode of making any appointment which may become necessary, the Court cannot appoint an arbitrator under this section. *Wilson and Eastern Counties Navigation & Co., In re*, (1892) 1 Q.B. 81=61 L.J.Q.B. 287. P

(8) Where submission does not provide.

If the submission does not provide, the reference is to a single arbitrator, and in such a case, if one of the parties to the submission refuses to concur in the appointment of an arbitrator, the terms of this section apply, and the Court will appoint; and, in fact, is bound to do so. *Eyre v. Corp. of Leicester*, (1892) 1 Q.B. 136. Q

(9) Umpire's appointment when commences.

An umpire's appointment dates from the time when he is appointed by the arbitrators, and not from the time when the duty of determining devolves upon him by reason of the arbitrators disagreeing. *Killett and Tranmere Local Board, In re*, 34 L.J.Q.B. 87=11 L.T. 457=18 W.R. 207. R

9.—“Shall have like power....consent o' all parties.”

Umpire appointed by Court—Powers.

An umpire appointed by the Court under this section has the like powers as if he had been appointed by consent of parties. *Russell*, 9th Ed., p. 180. S

Power for parties in certain cases to supply vacancy.

9. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party¹, then, unless a different intention is expressed therein,—

- (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies or is removed, the party who appointed him may appoint a new arbitrator in his place;
- (b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment made in pursuance of clause (b) of this section.

(NOTES).

Corresponding English Law.

This section corresponds to S. 6 of the English Arbitration Act, 1899, 52 and 53 Vict., c. 49. T

I.—“One to be appointed by each party.”

(1) Appointment by each party should refer to same subject-matter.

The appointment of an arbitrator by each party should refer to the same subject-matter. If A. appoint his arbitrator to determine a dispute respecting the construction of a lease, and the damages A. has sustained, and B. appoint his arbitrator to decide on the construction of the lease, and not as to damages, an award of damages to A. will be invalid. *Davies v. Price*, 6 L.T. N.S. 718=10 W.R. 865. U

(2) Appointment of two arbitrators under authority conferred by submission.

Where an appointment is made of two arbitrators under authority conferred by the submission contained in the contract :

Held, that the appointment was valid, S. 9 of the Arbitration Act being applicable only to cases where a different intention is not expressed in the submission. 7 S.L.R. 1=20 Ind. Cas. 504. V

10. The arbitrators or umpire acting under a
Powers of arbitra-
ter. submission shall, unless a different intention is
expressed therein,—

(a) ¹ have power to administer oaths to the parties and witnesses appearing;

(b) ² have power to state a special case for the opinion of the Court on any question of law involved; and

(c) ³ have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

(NOTES).

Corresponding English Law.

This section corresponds to Ss. 7 and 19 of the English Arbitration Act, 1899, 52 and 53 Vict., c. 49. W

I.—“Clause (a).”

Form of oath agreed upon by parties.

There is nothing illegal in the parties to an arbitration agreeing before Panchayatdars to have evidence taken after the administration of any reasonable form of oath to the witnesses. 2 L.W. 320=17 M.L.T. 241=29 Ind. Cas. 49. W-1

2.—“Clause (b).”

(1) Scope.

(a) With reference to the scope of S. 10 (b) of the Indian Arbitration Act, it is material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the Court by arbitrators, namely S. 7 (b), which permits the arbitrators to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court, and S. 19, which permits them

2.—“Clause (b)”—(Continued).

to state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference. 12 Bom. L.R. 852 (858, 859). X

- (b) The legislature in framing S. 10 (b) of the Indian Arbitration Act has deliberately followed the wording of S. 19 of the English Act and in framing Rule 11 of the 2nd Schedule of the Civil Procedure Code has followed the wording of S. 7 (b) of the English Act. 12 Bom. L.R. 852 (859). Y

(2) Object of the clause.

The object of clause (b) of this section is to give the Courts a control over arbitrations while they are proceeding. *Tabernacle Building Society v. Knight*, (1892) A.C. 298=62 L.J.Q.B. 50. Z

(3) Statement of special case—Indian Law.

This section leaves it to the discretion of the arbitrators to state a special case or not as they choose, and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow them. 10 Bom. L.R. 851 (859). A

(4) Statement of special case—English Law.

(i) COURT MAY ORDER AN ARBITRATOR TO STATE A SPECIAL CASE.

- (a) In England, the Court has jurisdiction under S. 19 of the Arbitration Act, 1889, to order an arbitrator to state a special case for the opinion of the Court upon a question of law arising in the course of the reference, although the arbitrator has not indicated what his view of the law will be. *Spillers & Baker, and Leestham, In re*, 66 L.J. Q.B. 326=1 Q.B. 312=76 L.T. 95=45 W.R. 241. B

- (b) An arbitrator cannot, after he had made his award, state a case for the opinion of the Court under S. 19 of the Arbitration Act, 1889, and the power of the Court to order a case to be stated under that section is limited in like manner. *Palmer and Hosken, In re*, 67 L.J. Q.B. 1=77 L.T. 330=46 W.R. 49. C

(ii) STATING CASE WHEN COMPULSORY.

If the terms of the submission be compulsory that the arbitrator shall state a case at the request of the parties, it is the duty of the arbitrator to set forth fully in his award all such facts as will raise all the questions of law on which the decision of the Courts is desired, and it seems that the award will generally be bad if he fail to do so. *Bradbee v. Christ's Hospital*, 4 M. & G. 714=11 L.J.C.P. 209; *Sheridan v. Nagle*, Ir. Rep. 6 C.L. 110. D

(iii) WHEN ARBITRATOR AT LIBERTY TO STATE CASE.

But if by the terms of the order of reference the arbitrator “be at liberty to raise any point for the opinion of the Court at the request of either of the parties,” he is not bound to do so unless he think fit. *Wood v. Hotham*, 5 M. & W. 674=9 L.J. (N.S.) Ex. 3. E

(5) Power of arbitrator to take opinion of Court.

The only section of the Indian Act, which gives the arbitrators power to take the opinion of the Court, is S. 10 (b), which provides that they shall have power to state a special case for the opinion of the Court on any question of law involved. 12 Bom. L.R. 852 (858). F

2.—“*Clause (b)*”—(Continued).

(6) Referring back an award to state a case for the opinion of Court.

If a party did not during the reference apply for a case, the Court would not refer back the award for the arbitrator to state a case afterwards, on his setting forth in a letter the wrong principles of law on which he had acted. *The London Dock Co. and St. Paul's Shadwell, In re*, 32 L.J.Q.B. 30. G

(7) Stating an award in the form of a special case and stating a case for opinion of the Court—Difference.

When the arbitrator has stated his award in the form of a special case, he has exhausted his powers, and has made his award in such a shape that the opinion of the Court will determine the rights of the parties and turn the award into one groove or the other, and the opinion of the Court is therefore an effective determination of the rights of the parties. Whereas, under this section, the arbitrator may, by means of a special case, take the opinion of the Court for his guidance and as a step for arriving at his own ultimate award in the matter, in which case the jurisdiction of the Court is consultative only, and the arbitrator still remains the final judge of law and fact. *Knight and Tabernacle Permanent Building Society, In re*, (1892) 2 Q.B. 618, *per* Bowen, L.J., at pp. 618, 619=62 L.J.Q.B. 33. H

(8) Application to state a special case when may be granted.

The application for an order to state a special case may be granted, even although the arbitrator has not indicated in what way he will decide the point raised. *Spillers and Baker, In re*, (1897) 1 Q.B. 312=66 L.J.Q.B. 326. I

(9) Refusal of arbitrator to state case or delay award.

This section impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrator to state at any stage of the proceedings, in the form of a special case for the opinion of the Court, a question of law arising in the course of the reference; and this right must be respected by arbitrators. If, therefore, a party to an arbitration *bona fide* requests the arbitrator to state a case, or to delay making his award until the party can apply to the Court for an order directing a stay, and the arbitrator refuses to comply with either request, he is *prima facie* guilty of misconduct within the meaning of S. 14 *infra*, such as would justify the Court in setting aside the award, or in remitting it to the arbitrator for further consideration under S. 18. *Palmer and Hosken, In re*, 67 L.J.Q.B. 1=77 L.T. 350=46 W.R. 49. J

(10) Serious point of law arising in the case.

If a substantial and serious point of law arises, the Court will order the arbitrator to state a special case under this section; even where the submission provides, in the widest possible terms, that all questions and disputes arising as to the interpretation, meaning, or effect of the contract, or as to any other matter or thing whatever connected with or arising out of the contract, or incidental thereto, or not thereby provided for, shall be referred to an arbitrator, whose decision shall be conclusive. *Nuttall and Lynton and Barnstaple Rail Co., In re*, 82 L.T. 17. K

(11) Question of law raised by letter written after award.

Where a submission contains a clause which gives power to an arbitrator to state a special case, and he is not desired by either party before the award is

2.—“Clause (b)”—(Continued).

made to exercise that power, the Court will not, on a letter of his written after the award, disclosing the legal principle on which he made his award, set it aside or send it to him for revision, although the letter was written with a view of raising the question whether the principle on which it was based was sound. *London Dock Co., In re*, 32 L.J. Q.B. 30=7 L.T. 881=11 W.R. 89. L

(12) Arbitrator should find facts—Court to determine points of law.

In stating a case, the arbitrator should find the facts, leaving the Court to determine the points of law. *North and South Western Junction Rail. Co. v. Brentford Union*, 13 App. Cas. 592=58 L.J.M.C. 95. M

(13) Order for statement of case made—Reference to be adjourned.

If an order for the statement of a case is made, the arbitrator will have to adjourn the reference till after the decision of the case, and if necessary he should enlarge the time for making his award. In his award he should adopt and act on the decision of the Court. *Russell*, 161. N.

(14) Costs of special case stated.

The Court, or judge, making the order for the statement of a special case, under this section has power under S. 17 to provide for the costs of the special case. If no such provision is made, the Court hearing the case has no power over the costs in cases where the arbitrator has power over the costs by virtue of the first schedule of the Act, clause i, *Knight and Tabernacle, &c., Building Society*, *In re*, (1892) 2 Q.B. 613; 62 L.J.Q.B. 88. O

(15) Opinion of Court on special case submitted—Appeal.

(a) The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons; and a Consent Judge's Order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that, in case of disagreement between the arbitrators, which prevented them from making an award, the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to an umpire. But the arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case, under the Civ. Pro. Code, 1908, Sch. II, r. 11, and the Indian Arbitration Act, S. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision:

Held, that no appeal lay, since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion; but there was simply a statement of a question of law for the opinion of the Court. The case was not, therefore, one which fell under r. 11, Sch. II, C.P.C. (1908); but it fell under S. 10 of the Indian Arbitration Act, in so far as it related to the second agreement. 12 Bom. L.R. 852. P

(b) According to the decisions of the Court of Appeal in England in *In re Knight and Tabernacle Permanent Building Society*, (1892) 2 Q. B. 613 and *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board*, (1893) 1 Q. B. 375, an appeal lies from the opinion of the Court expressed upon an award stated in the form of a special case, and that is provided for by S. 104 of the C.P.C. 12 Bom, L.R. 852. Q

2.—“ Clause (b) ”—(Concluded).

- (16) Case stated pending arbitration—Award wrong in Law—Power of Court of Appeal.

Where the Divisional Court gives advice to an arbitrator upon a case stated by him pending the arbitration proceedings, there is no appeal from the opinion given by that Court. But where an arbitrator, acting upon the opinion given by such Court, makes an award wrong in point of law upon its face, the Court of Appeal can set such award aside or remit it to the arbitrator, even although that involves saying that the law is different from that which the Divisional Court expressed it to be. (1912) 8 K. B. 128=81 L.J.K.B. 473=106 L.T. 328; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Rys. Co. of London*, (1912) A.C. 678=81 L.J.K.B. 1132=107 L.T. 325. B

3.—“ Clause (c). ”

- (1) Alteration of award by arbitrator.

After delivery of an award an arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures by making another award. *Irvine v. Elnon*, 8 East 54. S

- (2) Alteration of award by umpire.

An alteration by an umpire of the sum awarded, though made on the same day as, and before delivery of, the award, but after notice of making, is void; but the award is good for the original sum awarded, when it is still legible. *Henfrey v. Bromley*, 6 East 309=2 Smith 400=8 R.R. 491. T

- (3) Alteration by stranger.

The correction by a stranger of an immaterial mistake in an award after its publication is nugatory, not avoiding the award, but leaving the mistake uncorrected. *Trew v. Burton*, 1 C. & M. 588=2 L.J. Ex. 286. U

11. (1) When the arbitrators or umpire have made their award¹,

Award to be signed and filed, they shall sign² it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court³; and notice of the filing shall be given to the parties by the arbitrators or umpire.

(3) Where the arbitrators or umpire state a special case under section 10, clause (b), the Court shall deliver its opinion thereon; and such opinion shall be added to, and shall form part of, the award.

(NOTES).

Analogous Indian Law.

Compare Rule 10 of Sch. II of C.P.G., 1908.

V

N.B.—There is no section in the English Arbitration Act which corresponds to this section.

1.—“When the arbitrators...made their award.”

(1) Completion of award, what constitutes.

What constitutes a completion of the award may depend upon the terms of the submission, and upon the facts and the circumstances of the individual case. 14 C.L.J. 188. W

(2) Reference to several arbitrators—Refusal or omission of some to act—Effect.

On a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid, each of them must act personally in the performance of duties of his office, as if he were the sole arbitrator; for, as the office is joint, if one refuse or omit to act, the others can make no valid award. *Little v. Newton*, 2 M. & G. 351=10 L.J.O.P. 88; *Stalworth v. Inns*, 18 M. & W. 466=14 L.J. Ex. 81. See, also, 16 O.C. 94. X

(3) Reference to three arbitrators—Award by two.

(a) Where the reference is to three arbitrators all three must concur in the award; an award by two of them only is bad. *United Kingdom, etc., Assurance v. Houston*, (1896) 1 Q.B. 567=65 L.J.Q.B. 484. See *Morgan v. Boult*, 7 L.T. 671. Y

(b) Where the agreement of reference to arbitration gave the names of three persons, two of whom were described as *panches* and the third as a *sarpanch*, and provided that whatever decision was arrived at by the *panches* and *sarpanch* would be binding on the parties, *held*, that the award made by the two arbitrators alone, without the co-operation of the *sarpanch*, was invalid. 16 O.C. 94=17 Ind. Cas. 320. Z

(4) Award written on a paper already signed by one of the arbitrators, when valid.

Where an award had already been made and a judicial decision arrived at, a subsequent embodiment of the decision of the arbitrators in certain papers which already bore the signature of one of them and was signed subsequently by the others, did not vitiate the judicial act of the arbitrators. 14 C.L.J. 143. A

(5) Absent arbitrator signing blank paper on which award is written—Effect.

The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding. Where the absent arbitrator signs a blank paper on which the decision is written out by the other arbitrators, the award is void. *Ibid.* B

(6) Third arbitrator not appointed—Waiver of objection.

But if two arbitrators are to appoint a third to act with them, and they mistakenly appoint a person as umpire, and the two alone hold the reference and make the award, a party, who has attended the meetings without objecting to the case being heard by the two only, cannot afterwards impeach the award as invalid for want of the concurrence of the third arbitrator. *Marsh, In re*, 16 L.J.Q.B. 330. C

(7) Delegation of authority by arbitrators to each other.

The arbitrators may not delegate their authority even to each other. Two merchants, arbitrators, may not delegate to the third arbitrator, though he be a barrister, the decision of a point of law arising out of the case. *Little v. Newton*, 9 Dowl. 427=10 L.J.O.P. 89. D

I.— "When the arbitrators....made their award"—(Continued).

(8) One arbitrator adopting the opinion of another.

But if each of the arbitrators exercise his own independent judgment on the matters referred, it is no objection to the award that on discussion one gives way to the other, for where two differ in opinion, one or both must give way, otherwise they never can agree. *Eardley v. Steer*, 4 Dowl. 423 = 4 L.J. (N.S.) Ex. 293. E

(9) Delegation of authority as to valuation and estimate.

Where parties to an arbitration agreed to accept a certain estimate and valuation made by a certain person, and the arbitrator proceeded to examine that person as a witness and accepted his estimate and valuation: *Held*, that the arbitrator was thereby not guilty of delegating his authority to that person. 5 Ind. Cas. 621. F

(10) Decision with the help of third party.

(a) The mere fact that a third person gave help to the arbitrators to enable them to arrive at their decision does not vitiate the award. 12 M.L.T. 183 = 28 M.L.J. 290 = (1912) M.W.N. 1091. G

(b) The arbitrators cannot delegate or surrender their own judgment and conscience, but if they do not act 'contrary to their own judgment,' they can get the help of other's opinions in order to arrive at their own opinions. (*Ibid.*) H

(11) All arbitrators must act together.

As the arbitrators must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all. *Plews and Middleton, In re*, 8 Q. B. 845 = 14 L.J. Q.B. 139; *Lord v. Lord*, 5 E. & B. 404 = 26 L.J. Q.B. 34; *Beck and Jackson, In re*, 1 C.B.N.S. 695.

(12) All arbitrators together should execute the award.

Where there are two or more arbitrators, all should execute the award at the same time and place. If they fail to do so, such an error may invalidate the award. *Lord v. Lord*, 5 E. & B. 404 = 26 L.J. Q.B. 34; *Stalworth v. Inns*, 18 M. & W. 466 = 14 L.J. Ex. 81; *Eads v. Williams*, 24 L.J. Ch. 581; *Wade v. Dowling*, 4 E. & B. 44. See *Little v. Newton*, 9 Dowl. 497 = 10 L.J. C.P. 88. J

(13) Award not signed by all arbitrators at the same time.

Where, on a reference to arbitration, the case was regularly heard by all the arbitrators sitting together, and an award was drawn up and signed by them, the fact that the arbitrators did not sign the award at the same time would not invalidate the award. 15 C.L.J. 860. K

(14) Alteration of a completed and published award.

When the arbitrator has made, or made and published, his award as a completed instrument, his power is wholly at an end. If, after executing the award, the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory, and his act is like a spoliation by a mere stranger. 14 C.L.J. 188. L

(15) Publishing award.

The English Arbitration Act, 1899, provides only for the making of the award, and does not refer to publishing. As regards the validity of the award

1.—“When the arbitrators....made their award”—(Concluded).

this probably makes no difference, because the award was in general considered as “published” as soon as the arbitrator had done some act whereby he became *functus officio*, that is, as soon as he had made a complete award. *Brooke v. Mitchell*, 6 M. & W. 473=9 L.J. (N.S.) Ex. 269. M

(16) Alteration of award before publication.

Until the arbitrators have finally published their award as their final determination, they may make alterations therein. 14 C.L.J. 188. N

(17) Arbitrator not bound to give reasons for his decision.

Sadasiva Iyer, J.—An award need not be a reasoned judicial decision. The arbitrators need not give the reasons for their conclusions. They are not even bound to record anything of the proceeding. (1912) M.W.N. 1076. O

(18) Arbitrators need not decide where no formal decision wanted.

Arbitrators are not bound to decide a point if the parties showed that they did not want a formal decision on it. (1912) M.W.N. 1076. P

2.—“Sign.”

(1) Writing and signing of an award, essential.

S. 11 requires that the award should be signed and filed. The arbitrators are bound, at the request of any party, to file the award, or a copy thereof in Court, and such an award, unless it is set aside or remitted for re-consideration, becomes enforceable as if it were a decree of Court. The writing and signing of an award is not, therefore, a formality that may be dispensed with by the parties. It stands in this respect on the same footing as a decree. 7 M.L.T. 355=5 Ind. Cas. 374. Q

(2) Award not signed by minority.

When the parties have agreed to abide by the decision of the majority of the arbitrators, an award cannot be set aside on the ground that it has not been signed by the minority. 1 Patna L.J. 90. Q.1

(3) Oral award—Effect.

So, where the arbitrators gave their decision in the presence of the parties, but there was no award in writing as the parties thought it would be sufficient to actually carry out the award, held, the award is not binding upon the parties, and that a suit relating to the matter upon which such an award has been made is not barred by the award. 7 M.L.T. 355=5 Ind. Cas. 374. R

3.—“Cause the award....to be filed in the Court.”

(1) Award to be filed at the instance of arbitrator.

Under the provisions of the Indian Arbitration Act, an award is to be filed not on the application of the parties, but at the instance of the arbitrator. 40 C. 219=17.C.W.N. 395=18 Ind. Cas. 978. S

(2) Party agreeing to submit to arbitration of Bengal Chamber of Commerce—Party, if bound by rules.

Where a party to a contract agrees to submit to an arbitration of the Bengal Chamber of Commerce, the rules of the Chamber are imported into the contract and that party is bound by those rules. 30 Ind. Cas. 681=19 C. W.N. 820. S.1

3.—“Cause the award...to be filed in the Court”—(Concluded).

(3) Petition to file award signed by one arbitrator.

The fact that only one arbitrator had signed the petition to file the award does not render the award illegal as contravening the terms of S. 11, Arbitration Act. In ‘causing the award to be filed’ at the request of a party, the arbitrators are not acting judicially, they are performing only a ministerial act which can be legally performed by one of them. 8 S.L.R. 302=29 Ind. Cas. 602. T

(4) Application to file award—Questions for consideration.

On an application to file an award under this Act, the only questions which can be properly considered are questions within the scope of Ss. 13, 14 and 15. 6 S.L.R. 127=19 Ind. Cas. 863. T-1

(5) Award against a firm—Question whether a particular person is a partner.

In a proceeding to file an award against a firm, the question whether a particular person is a member of the firm cannot be determined, as it is one which does not arise under any of the Ss. 13, 14 and 15. 6 S.L.R. 127. (Cf. 13 C.W.N. 63, *infra*). U

(6) Award against a firm without ascertaining its members.

An award made against a firm, without ascertaining as to who are the persons who constitute it, is, on the face of it, bad and no Court can make a decree in such circumstances, upon the award, against a firm. 13 C.W.N. 63=1 Ind. Cas. 371. V

(7) Order setting aside award filed under this section lies—No appeal.

There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. S. 89 of the Civ. Pro. Code especially excepts the procedure of the Code from arbitrations under the Arbitration Act, and S. 4, C.P.C., does the same generally. S. 104 (1) (f), C.P.C., applies only to arbitrations under the Code. 6 L.B.R. 88=5 Bur. L.T. 155=17 Ind. Cas. 902. W

Power for Court to enlarge time for making award. 12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

(NOTES).

(1) Corresponding English Law.

This section is a verbatim copy (except for the omission of the words “or a judge”) of S. 9 of the English Arbitration Act, 1899. X

(2) Analogous Indian Law.

Compare Rule 8, Sch. II, Act V of 1908. Y

(3) Construction.

This section bears the same construction and confers the same power as the corresponding section of the English Act. 4 S.L.R. 82. Z

1.—“Power for Court to enlarge time for making award.”

(1) Power of Court to enlarge time after award.

(a) The Court is competent to extend the time “for making” the award even after the award has been made by the arbitrator. 4 S.L.R. 96; 6 S.L.R. 89; 19 Ind. Cas. 374. A

1.—“Power for Court to enlarge time for making award”—(Continued).

- (b) “No limit of time is given within which the Judge may enlarge the time and he is not limited to the time within which the arbitrator himself could enlarge it, even although it be said on the submission that the arbitrator shall make his award on or before a certain day.” *Per Lush, J.*, in *Lord v. See*, I.R. 3 Q.B. 404. B
- (c) In *Knowles and Sons Ltd. v. Bolton Corporation*, (1900) 2 Q.B. 253, it was held that there was jurisdiction in the Court or Judge to make the order asked for (an order for enlargement of the time) although the time for making the award had elapsed before the application was made at chambers and although the award had been in fact made. This case was decided under the English Arbitration Act, and the English Courts construe the words of the section as giving power to the Courts to enlarge the time even after the award has been made. 4 S.L.R. 33 (34). C
- (d) A rule or order to enlarge the time would not be granted as of course. *Edwards v. Davies*, 23 L.J.Q.B. 278. D

(1-a) Discretion of Court to extend time not confined to question of arbitrator's diligence.

In the exercise of the discretion given to the Court by S. 12, Arbitration Act, the Court is not confined to the question whether or not the arbitrator had been diligent and expeditious in the proceedings. The Court should exercise its discretion on a consideration of all the circumstances of the case and is bound to consider whether the case is a fit one for the grant of such an indulgence. 8 S.L.R. 269=28 Ind Cas. 85. D-1

(2) No extension of time allowed where the award has been made and filed beyond time.

Time can only be extended as long as the award has not been made and filed; no extension can be allowed in a case where the award has been made and filed beyond time. Where an award has not been properly made and filed according to law, it is a nullity and the decree passed on the basis thereof should be set aside. 9 Ind. Cas. 241. E

(3) Enlargement by arbitrator ratified by Court.

(a) When the submission directs that the time may be enlarged as the arbitrator may require, and as a Judge or the Court may think just and reasonable, if the arbitrator, within the time limited, make an endorsement on the submission that he requires further time, the Judge's order ratifying that enlargement may be obtained after the original time has elapsed. *Reid v. Fryatt*, 1 M. & S. 1. F

(b) But it must be obtained before the award is executed, or the arbitrators will have no authority to make it. *Mason v. Wallis*, 10 B. & C. 107=8 L.J. (O.S.) K.B. 109. G

(4) Enlargement by Court—Enlargement by arbitrator—Difference.

(a) A distinction between enlargement by the arbitrator and enlargement by the Court should be noted. The arbitrator must exercise his power of enlarging during the period limited for making his award, but the Court is not limited to such period. *Hall v. Rouse*, 4 M. & W. 24, *per Parke*, B., p. 26=7 L.J. (N.S.) Ex. 214; *Parberry v. Newnham*, 7 M. & W. 378=10 L.J. Ex. 169; *Lessia v. Richardson*, 6 Q.B. 378=17 L.J.C.P. 324; *Bowen v. Williams*, 3 Ex. 98. H

I.—“Power for Court to enlarge time for making award”—(Continued).

- (b) If the arbitrator is to make his award before any day, not exceeding three months from the date of the agreement, to which he may by writing, &c., enlarge the time, he cannot extend his power beyond the three months. *Denton v. Strong*, L.R. 9 Q.B. 117; 48 L.J.Q.B. 41. I
- (c) A submission empowered an arbitrator to award on or before a certain day, “or on such further day as he by memorandum in writing under his hand to be endorsed hereon.” The Court held that, notwithstanding that the sentence was incomplete by the omission of the words “shall appoint,” it could supply the defect, and that the arbitrator had authority to enlarge the time. *Kirk v. Unwin*, 6 Ex. 908; 20 L.J. Ex. 345. J
- (5) **Enlargement after expiry of original time.**
When he has the power, and desires to use it, the arbitrator should take care to make the enlargement during the time primarily fixed for making the award. An enlargement by the arbitrator, made after his original time has expired, is inoperative. *Russell*, 9th Ed., p. 116. K
- (6) **Enlargement from time to time.**
It is not necessary that the submission should expressly give the arbitrator power to enlarge *from time to time*, for if it direct the award to be made on a certain day, or on or before any other day to which the arbitrator should enlarge the time, he is not limited to a single enlargement, but may enlarge the time as often as he finds necessary. *Payne v. Deakle*, 1 Taunt. 509; *Barrett v. Parry*, 4 Taunt. 658; *Leggett v. Finlay*, 6 Bing. 255=8 L.J. (O.S.) C.P. 52. See *Anon.*, 2 Chitty Rep. 45. L
- (7) **Enlargement of time after death of a party.**
If the submission provide that the death of a party shall not be a revocation, and contain the usual power for enlarging the time, as the arbitrator has express power given him to make his award after the death of either party, so he has incidentally the same power of enlarging the time after that event as he had before. *Tyler v. Jones*, 3 E. & G. 144; *Clarke v. Crofts*, 4 Bing. 143=5 L.J. (O.S.) C.P. 127. M
- (8) **Day for making award stated.**
If a party write to an umpire, telling him that the 29th of November is the last day on which he can make his award, it seems very doubtful whether it is competent for that party afterwards to object that an award made on the 29th of November is made too late. *Higham and Jessop, In re*, 9 Dowl. 203. N
- (9) **Enlargement refused where long delay is not explained.**
The Court will not enlarge the time for making an award where there has been a long delay (*e.g.*, three years) since the last step was taken, and such delay is not satisfactorily explained, because the position of the parties may be altered, and they may be unable to produce their witnesses. *Doe d. Mays v. Cannell*, 22 L.J.Q.B. 321=17 Jur. 347=1 W.R. 307. O
- (10) **Enlargement of time by consent.**
An enlargement of the time of reference, made subsequently to the time within which the award ought to have been made, but with the consent of all parties, is good. *Jones v. Powell*, 1 W. & W. & H. 60. P

I.—“Power for Court to enlarge time for making award”—(Continued).

(11) Conduct may amount to consent.

The conduct of the parties will often be taken to amount to a consent on their part to an enlargement of the time, and a consequent continuation of the arbitrator's authority. *Bennett v. Wilson*, 29 L.J. Ex. 357; *Tyerman v. Smith*, 25 L.J.Q.B. 359=6 E. & B. 719; *Winteringham v. Roberison*, 27 L.J. Ex. 301. Q

(12) Waiver of objection to invalid enlargement.

(a) An objection that the time for making an award has not duly been enlarged is waived by proceeding in the reference with a knowledge of that fact. *Lawrence v. Hoddyson*, 1 Y. & J. 16=30 R. R. 754; *S.P. Hallett v. Hallett*, 5 M. & W. 25=7 D.P.C. 589=2 H. & H. 3=8 L.J. Ex. 174=3 Jur. 727. *Leggett v. Finlay*, 6 Bing. 255=3 M. & P. 629=8 L.J. C.P. 52. And see *Tyerman v. Smith*, 5 W.R. 547. R

(b) But although attending several times before the arbitrator may waive all objections to the sufficiency of previous enlargements of the time made by him, invalid for want of a Judge's order to ratify them as required by the submission, such attendances cannot be construed to imply a consent that the arbitrator may make future enlargements by himself alone, and an enlargement so made subsequent to the last meeting in the reference is entirely void. *Mason v. Wallis*, 10 B. & C. 107=8 L.J. (O.S.) K.B. 109. S

(c) If by the terms of the submission the arbitrators are to appoint an umpire previous to entering on a consideration of the matters referred, and they enlarge the time for making the award before they appoint an umpire, and the parties, with knowledge of these facts, attend a meeting before the arbitrators, they will be taken to have waived the objection as to the irregular enlargement of the time. *Hick, In re*, 8 Taunt. 694. T

(13) Reference to two arbitrators with power to appoint a third—Enlargement.

When a cause is referred to two arbitrators with power to them to appoint a third, the award to be made by a day named or such other day as they or any two of them shall appoint, the first two named cannot make a valid enlargement of the time until the third is appointed, as enlarging the time is an act of judgment, and the parties have a right to have all three in a situation to exercise a judgment on the point. *Beade v. Dutton*, 2 M. & W. 69. U

(14) Mode of enlargement of time.

Unless the submission prescribes the mode in which the enlargement is to be made, the arbitrator may, it seems, adopt any mode that expresses his intention of enlarging the time. A verbal appointment made to both parties for a future meeting to be held on a day beyond the limit of the original period, to which neither party objected, was considered a sufficient enlargement to that day, and the award made on that day was sustained as made within due time. *Burley v. Stephens*, 1 M. & W. 156=5 L.J. (N.S.) Ex. 92. V

(15) Enlargement should be according to submission.

If the submission direct the manner in which the enlargement is to be made, that direction should be literally followed. *Russell*, 9th Ed., p. 117. W

1.—“Power for Court to enlarge time for making award.”—(Concluded).

(16) Form of enlargement.

No particular form of words is necessary for an endorsement to enlarge the time under the usual power in the submission. If the arbitrator in substance express his opinion that the time should be enlarged, it is sufficient. Russell, 9th Ed. p. 118. X

(17) Enlargement to be signed.

The enlargement is to be in writing signed by the arbitrators. (*Ibid.*) Y

(18) Enlargement by re-executing submission.

Where the time for making award was enlarged by parties altering and re-executing the bonds of submission, the arbitrator is justified in awarding interest on principal found due beyond the date of the original submission and up to the time of the re-execution. *Watkins v. Phillipotts*, 1 M'Clel. & Y. 393=29 R.R. 809. Z

(19) Enlargement “until” a day named, meaning.

If the time is enlarged “until” a day named, as the word “until” may be construed either inclusive or exclusive, the arbitrator will generally have the whole of the day named included, and may make his award at any time during that day. *Kerr v. Jeston*, 1 Dowl. N.S. 588; *Knox v. Symmonds*, 3 Brown C. C. 558. See *Dakins v. Wagner*, 3 Dowl. 535; *B. v. Stevens*, 5 East 244. A

Power to remit award. 13. (1) The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted under sub-section (1), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award² within three months after the date of the order remitting the award.

(NOTES).

Corresponding English Law.

This section follows the provisions of S. 10 of the English Arbitration Act, which in its turn follows the provisions of S. 8 of the Common Law Procedure Act, 1854 (now repealed), which applied to all compulsory references under the Act, and to all references by consent of parties where the submission was or might be made a rule of Court. A-1

Analogous Indian Law.

Compare Rule 14, Sch. II of C.P.C., 1908.

B

1.—“Power to remit award.”

(1) Discretion of Court to remit.

The Court, in the exercise of its discretion, has power to remit a private award for the reconsideration of the arbitrators under this section. 29 C. 793. C

(1-a) Remission of award, when can be made.

Where the award is bad on the face of it, where there has been misconduct on the part of the arbitrator, where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, and where additional evidence has been discovered after the making of the award, the award could be remitted to the arbitrator for re-consideration. 41 C. 313. D

I.—“Power to remit award”—(Continued).

(2) Arbitrator *functus officio*—Remission.

The Court has power to remit the matters referred to the re-consideration of the arbitrator, even although he be *functus officio*. *Stringer and Biley Brothers, In re*, (1901) 1 K.B. 105=70 L.J.K.B. 19. E

(3) Power of remitting award how exercised.

In England, the power of remitting is frequently exercised on a motion being made to set the award aside, and on a defect being pointed out, in opposition to the party objecting to the award. *Anning v. Hartley*, 27 L.J. Ex. 145; *Petersen v. Ayre*, 14 C.B. 665=23 L.J.C.P. 129; *Howell v. Clements*, 1 C.B. 128. F

(4) Time for making an application to remit an award.

The time for moving to refer back an award is not limited to the period for setting it aside, but the court has a discretion to allow such motions to be made at any time, though it will require them to be made within a reasonable period, or the delay must be satisfactorily explained. *Lisces-ter v. Grazebrook*, 40 L.T. 883; *Warburton v. Haslingden Local Bd.*, 48 L.J.C.P. 451. G

(5) Miscarriage in the conduct of the reference.

Unless the Courts think that the arbitrator can no longer be trusted, they will remit the award to him, though he has miscarried in the conduct of the reference, as, for instance, if he have, without an improper motive, asked some questions of a witness in the absence of the parties, or where there are several arbitrators, if they have executed the award separately. *Anning v. Hartley*, 27 L.J. Ex. 145. H

(6) Discovery of new evidence is a ground for remission.

The discovery of new and material evidence since the award may be good ground for an application to refer back the award. *Keighley, Maxted and Co., In re*, (1898) 1 Q.B. 405=62 L.J.Q.B. 105; *Burnard v. Wainwright*, 1 L.M. and P. 455=19 L.J.Q.B. 429. See, also, 41 C. 313=25 Ind. Cas. 891. I

(6-a) Award in excess of the claim.

Where the award is in excess of the claim the arbitrators act beyond their jurisdiction and the award cannot be sustained and should be remitted for re-consideration. 25 Ind. Cas 951. See 22 C.L.J. 287. I-1

(7) Mistake of arbitrator.

A mistake of the arbitrator is not a ground for sending back the award for further consideration. *Wordsdell v. Holder*, 1 L.T. 14. J

(8) Mistake admitted by arbitrator.

If a mistake is admitted by the arbitrator, or if the Court thinks that the principle stated by the arbitrator as the ground of his award is not consistent with the reference, the award may be referred back. *Mills v. The Bowyer's Society*, 3 K. and J. 66; *Flynn v. Robertson*, L.R. 4 C.P. 324=38 L.J.C.P. 240. See *Mordue v. Palmer*, L.R. 6 Ch. 92=40 L.J.Ch. 8. See, also, 41 C. 313=25 Ind. Cas. 391. K

(9) Mistake as to legal effect of award.

A mistake by the arbitrator as to the legal effect of his finding is no ground for setting aside an award. *Greenwood v. Brownhill*, 44 L.T. 47. L

I.—“Power to remit award”—(Continued).

(10) Mistake as to name.

Where an arbitrator made an award describing the plaintiff by a wrong Christian name, the court sent it back to him for correction. *Howett v. Clements*, 7 Man. and G. 1045=8 Scott. 851=2 D. and L. 549=14 L.J. Q.B. 75; 9 Jur. 17. M

(11) Mistake of law—Arbitrator admitting mistake.

An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake. *Dunn v. Blake*, 44 L.J., C.P. 276=L.R. 10 C.P. 388=82 L.T. 489. *Montgomery, Jones and Co. and Liebenthal, In re*, 78 L.T. 406. *The London Dock Co. v. St. Paul's Shadwell*, 32 L.J.Q.B. 30. N

(12) Mistake apparent on face of award.

The Court will not set aside an award on the ground that the arbitrator has made a mistake in law or fact, unless, perhaps, the mistake is either apparent on the face of the award, or appears in some document delivered by the arbitrator contemporaneously with it, or perhaps by the affidavit of the arbitrator. *Hegge v. Burgess*, 3 H. and N. 293; 27 L.J., Ex. 818; 4 Jur. 668; 6 W.R. 504. O

(13) Mistakes not vitiating award.

The following mistakes do not vitiate the award:—

- (a) Mistake as to the Christian name of one of the arbitrators. *Trew v. Burton*, 1 C. & M. 583=2 L.J. (N.S.) Ex. 286. P
- (b) Mistake as to the appointment of the umpire. *Adams v. Adams*, 2 Mod. 169. Q
- (c) Mistake as to the number of the arbitrators by whom the award is executed. *White v. Sharp*, 12 M. & W. 712; 18 L.J. Ex. 215. R
- (d) Mistake as to the date of the submission. *Dole v. Dawson*, 2 Keb. 878; Vent. 184; *Ingram v. Webb*, 1 Rolle Rep. 362. S
- (e) Mistake as to the date of an enlargement of time, so that it appeared too late. *Lloyd and Spittle, In re*, 6 D. & L. 581=18 L.J.Q.B. 151. T
- (f) Mistake as to the extent of the subject-matter. *Paull v. Paull*, 2 C. & M. 285. U
- (g) Mistake as to the arbitrators having “considered the decision of the umpire” where there had, in fact, been no consultation with the umpire. *Harlow v. Read*, 3 D. & L. 503=14 L.J.C.P. 289. V

(14) Misapprehension of evidence.

When an award has been made in an arbitration based upon figures and evidence laid before the Court, the question of the amount of the award cannot be re-opened on the ground that some of the evidence has been misapprehended or misunderstood. *Great Western Railway Co., and Postmaster-general, In re*, 19 T.L.R. 686. W

(15) Arbitrator mistakenly declining jurisdiction—Remission.

If the arbitrator, thinking that his jurisdiction was confined to matters of account, mistakenly refused to investigate a charge of fraud, the Court would remit the award. *Insull v. Moogen*, 27 L.J.C.P. 75=8 C.B.N.S. 859. X

I.—“Power to remit award”—(Continued).

- (16) Arbitrator guilty of legal misconduct as distinguished from moral misconduct.
 Where the arbitrator gives no notice to the parties of his intention to enter upon the reference or of the time or place of his doing so and he otherwise acts irregularly in the discharge of his duties, he is guilty of legal misconduct (as distinguished from moral misconduct in the case of corruption, partiality, etc.) and the award must be set aside, and the Court has the power to remit the award to the arbitrator for re-consideration. 41 C. 318=25 Ind. Cas. 391.

Y

(17) Award imperfect in part.

- Where an award is in part reasonable and conclusive, but in another part imperfect and deficient, a Court of equity will, on the application of any of the parties in difference, remit it to the arbitrators to reconsider and amend it. *Aithem, In re, 3 Jur. 1296.*

Z

(17-a) Award bad in part.

- (a) When a separable portion of an award is bad, the remainder, if good, can be maintained. 36 A. 386 (P.C.)=18 C.W.N. 755=27 M.L.J. 181=16 Bom. L.R. 413.
- (b) Where the different parts of an award are severable and not dependent upon each other, the illegal portion may be cancelled and effect given to the remainder. 22 C. 287=31 Ind. Cas. 33.

L-1

L-2

(18) Award bad on the face of it.

- Where the award is bad on the face of it, where there has been misconduct on the part of the arbitrator, where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, and where additional evidence has been discovered after the making of the award, the award could be remitted to the arbitrator for re-consideration. 41 C. 318=25 Ind. Cas. 391.

A

(19) Costs not correctly certified.

- Where the award, as drawn in the plaintiff's favour, contained a certificate which entitled the plaintiff to costs only on the lower scale, and the arbitrator, being applied to, stated that he had intended to give the plaintiff his full costs, the Court remitted the award to the arbitrator, but at the plaintiff's expense, saying that the defendant ought not to be put to expense for an error to which he had not contributed. *Caswell v. Grecutt, 31 L.J. Ex. 361; Cross v. Cross, 18 O.B.N.S. 258.*

B

(20) Opportunity to explain a document.

- Where an arbitrator had read and relied on a letter of the defendant in a letter-book containing other letters, but the particular letter had not been put in evidence, the Court referred back the award in order that the defendant might have an opportunity of explaining the letter. *Davenport v. Vickery 9 W.R. 701.*

C

(21) Omission to find separately as to items of claim.

- Where the arbitrator would have been justified in finding separately on each of the terms contained in the declaration, and the court thought that his failure to do so might have worked some injustice, they sent the case back to give him the opportunity of setting the matter right. *Gore v. Baker, 4 E. & B. 470=24 L.J.Q.B. 94.*

D

1.—“Power to remit award”—(Concluded).

(22) Irregularity in proceedings before arbitrator.

Although there may have been some irregularity in the proceedings before the arbitrator, the Court will not set aside the award, where no personal misconduct or gross disregard of proper rules is suggested, but will send back the award to the same arbitrator. *Anning v. Hartley*, 27 L.J. Ex. 145. See *Tidswell, In re*, 33 Beav. 213. E

(23) Suit for partition and possession—Award merely declaring shares of parties.

In a suit for partition and possession referred to arbitration, if the award merely declares the shares of the parties, it falls short of the reference. Such an award should be remitted to the arbitrator for completion. 19 Ind. Cas. 374. F

(24) Remission to surviving arbitrators.

A submission to several arbitrators contained a power to remit the award, followed by a clause that, in the event of the death of one of the arbitrators before the award, the parties, or in case of the parties not agreeing, the Court should have power to appoint a new arbitrator; after an award made, one arbitrator died. The Court remitted the matters back to the survivors and to the new arbitrator to be appointed pursuant to the reference. *Lord v. Hawkins*, 2 H. & N. 55. G

2.—“Make a fresh award.”

(1) Duty of arbitrator to hear evidence.

It is the duty of the arbitrator to hear additional evidence on the points submitted to his consideration, if they be such as require evidence, if tendered, on all and not merely on the point on which the award is deficient. *Nickalls v. Warren*, 6 Q.B. 615=14 L.J.Q.B. 75. See *Baker v. Hunter*, 16 L.J. Ex. 203=16 M. & W. 672. H

(2) Remission for a specific purpose—Notice to parties.

When the Court, being empowered so to do, remits the award for a specific purpose, as for instance the amendment of a clerical error or a technical defect in form, in regard to which the arbitrator needs no assistance from either party, he is not bound to give either party notice to attend before him on his reconsidering and amending his award. *Howett v. Clements*, 1 C.B. 128; *Johnson v. Latham*, 20 L.J.Q.B. 236. I

(3) Second award how to be framed.

Whether the reference back be general or limited to some one or more matters, the second award should embrace every matter originally referred, either by confirming the first award in terms as to matters not referred back, or, what seems better, by re-copying the first award as to such matters on which the arbitrator cannot alter his decision, into the second award. *Johnson v. Latham*, 20 L.J.Q.B. 236. J

(4) Remission to cure a misnomer of a party.

Where the award is sent back to cure a misnomer of one of the parties, it is sufficient if the arbitrator make a certificate that the award ought to be amended by substituting the right name for the wrong, and that the award should be read as if the right name had been originally inserted. *Davies v. Pratt*, 16 C.B. 586. K

14. Where an arbitrator or umpire has misconducted himself¹, or an arbitration or award has been improperly procured², the Court may set aside the award³.

(NOTES).

Corresponding English Law.

This section corresponds to S. 11, cl. (2) of the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. L

Analogous Indian Law.

Compare (i) Rule 15, Sch. II, C.P.C., 1908.

(ii) Punjab Land Revenue Act, S. 135. M

I.—“ Misconduct himself.”

(1) Arbitrator not to misconduct himself.

It is of the highest importance, in the interest of the parties making a reference, and in the interest of the arbitration generally, that arbitrators should do nothing to make their conduct liable to misconstruction or to shake the confidence reposed by the parties in them. 18 Ind. Cas. 92. M-1

(1-a) Refusal of arbitrator to state a special case.

It will be misconduct in an arbitrator within the section if, on a bona fide request being made to him on reasonable grounds, either to state a special case, or to delay his award until application can be made under S. 10 (5) of the Act for an order directing him to do so, he refuses to comply, and by making his award forthwith attempts to preclude the party from making the application. *Palmer & Co., and Hasken & Co., In re*, (1898) 1 Q.B. 131=67 L.J.Q.B. 1. N

(2) Refusal of arbitrator to allow time to get counsel.

There may be ample misconduct in a legal sense to make the Court set aside an award, even where there is no ground for imputing the slightest improper motive to the arbitrator. Thus, the award will be set aside if the arbitrator refuse to postpone a meeting for the purpose of allowing a party time to get counsel on his part, where the other side unexpectedly appears by counsel. *Whatley v. Morland*, 2 Dowl. 249; 3 L.J. (N.S.) Ex. 58.

(3) Fraud and dishonesty amount to misconduct.

Fraud and dishonesty on the part of the arbitrator amount to misconduct on his part which may afford good ground for setting aside the award and do not affect his jurisdiction. 5 S.L.R. 240=15 Ind. Cas. 819; 25 B. 337 (347); 6 B. 663. P

(4) Refusal to hear evidence when amounts to misconduct.

(a) The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm. 18 C.W.N. 68=1 Ind. Cas. 371. Q

(b) An award would be avoided if the arbitrator refuses to hear evidence on a claim within the scope of the reference, on a mistaken supposition that it is not within it. *Samuel v. Cooper*, 2 A & E. 752. R

I.—“ Misconduct himself ”—(Continued).

(4-a) Parties' power to restrict evidence.

(a) “Can there, be a valid submission where parties contract that neither they nor their witnesses shall give evidence? The answer to this lies in the materials which the arbitrators have before them for determining the dispute. If there be no other evidence save the oral testimony of the parties and their witnesses or if such other evidence is so slight or of such little value that the arbitrators cannot be fairly said to be able to exercise a judicial discretion in the matter than such submission amounts merely to a wager on the fancy, whim or partiality of the so-called arbitrators which, of course, is no valid submission at all. On the other hand, there seems no reason why parties should not contract to go to trial on certain evidence : see *Re Mander* (49 L.T. 535). All oral evidence may be agreed to be excluded by the the parties relying solely on the documentary evidence in the case. As a matter of fact this is very often tacitly agreed to in disputes between merchants where the parties cannot by giving oral evidence add anything to what is already set out in the documents and correspondence in the matter. A common example of this is the case of goods ordered out under an Indent where the dispute is whether the goods tendered are of the quality or description indented for. That is a matter of inspection of the Indent and the basis and shipment samples and possibly the correspondence to which the parties can, as a rule, add nothing by oral evidence. The arbitrator in such a case is usually acquainted with the line of business and yet not so highly as to be called an expert in it. Moreover, we see no reason why parties should not be allowed to contract to curtail an inquiry before arbitrators by agreeing to rest their case on the documentary evidence alone provided as we have said it is sufficient to enable arbitrators to really exercise a judicial discretion and not to decide haphazard or by chance.” 7 S.L.R. 113 (115). R-1

(b) That the motion of a “hearing” of the parties is not essential to the understanding of a submission to arbitration seems clear from the fact that there may be a valid submission to an expert in whose special knowledge alone the parties confide and who may decide the matter without taking any oral evidence. 13 C.W.N. 69. 7 S.L.R. 113 (115). R-2

(5) Submission providing that parties or witnesses, shall be heard or not as arbitrators chose.

Where the reference provides for the arbitrators hearing the parties or their witnesses or not as they chose, the submission is not necessarily invalid *qua* a submission under the Indian Arbitration Act. 7 S.L.R. 113=24 Ind. Cas. 264. R-3

(5-a) Examination of witness or party in the absence of opponent.

(a) An award may be impeached if the arbitrator, contrary to the principles of natural justice, examine a witness or a party privately or in the absence of his opponent; unless the irregularity be subsequently waived by the parties. *Dobson v. Groves*, 6 Q.B. 637=14 L.J.Q.B. 17; *Harvey v. Shelton*, 7 Beav. 455. S.

(b) In arbitration proceedings, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it except

I.—“Misconducted himself”—(Continued).

in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. 18 C.L.J. 899. T

(c) But it does not amount to misconduct of an arbitrator if he takes evidence in the absence of the parties, with their express or implied consent. 73 P.W.R. 1910=6 Ird. Cas. 963. U

(6) Improper admission or rejection of evidence.

An award will not be set aside if the arbitrator erroneously rejects admissible, or receives inadmissible evidence. *Hagger v. Baker*, 14 M. & W. 9=14 L.J. Ex. 227. V

(7) Discretion of arbitrator to hear evidence and counsel.

Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances of every case, the arbitrators exercising, in a judicial manner, their discretion in the matter. 18 C.W.N. 68=1 Ind. Cas. 371. W

(8) Tender of witness.

In order to make out a case entitling a party to impeach the award, the witness must be distinctly tendered to the arbitrators. 15 C.L.J. 860. X

(9) Case closed by party—Calling further evidence left to discretion of arbitrator.

Where a party closes his case before an arbitrator and leaves it to his discretion to call any further evidence and the arbitrator gives his award on the materials at hand, the party is estopped from contending that there was insufficient inquiry. 14 Ind. Cas. 371. Y

(10) Two out of three arbitrators holding meetings without notice to third.

Even when the submission provides that an award made by any two out of the three arbitrators shall be valid, if two of them hold meetings alone, without notice to the third, the award may be impeached; but not if after notice the latter stay away. *Dalling v. Matchett, Willes*, 215. Z

(11) One of several arbitrators excluded from meetings by others.

So it will be bad, if the two exclude the third from the meetings by force or fraud, or make an award without first taking his opinion. *Templeman and Reed, In re*, 9 Dowl. 962. A

(12) Proceeding *ex parte* without sufficient cause.

If the arbitrator proceed *ex parte* without sufficient cause or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided. *Gladwin v. Chilcote*, 9 Dowl. 550. See, also, 3 S.L.R. 110, *infra*. B

(13) Award without hearing all evidence.

The award may be impeached if the arbitrator make his award without having heard all the evidence. *Phipps v. Ingram*, 3 Dowl. 669. C

(14) Corruption or partiality of arbitrator.

The award will be set aside on motion, if it be proved that the arbitrator is corrupt or partial. *Tittensor v. Peat*, 3 Atk. 529; *Morgan v. Maister*, 2 Ves. Jr. 15; *Burton v. Knight*, 2 Vern. 514. D

I.—“Misconducted himself”—(Continued).

(15) Arbitrator interested.

An award will be avoided if the arbitrator is secretly interested in the subject referred. *Earl v. Stocker*, 2 Vern. 251. E

(16) One of several arbitrators taking counsel's opinion on incorrect statement of facts.

When there are several arbitrators, if one of them take counsel's opinion on an incorrect statement of the facts, and knowingly act upon it, the award will be set aside, but not if he take an opinion on a case truly drawn up. *Hare, In re*, 6 Bing. N. C. 158. F

(17) One of the arbitrators accepting illegal gratification from one of the parties.

Where one of the arbitrators is guilty of misconduct and is found to have accepted an illegal gratification from one of the parties concerned, the award ought to be set aside in its entirety, inasmuch as it is difficult to say how far the other arbitrators were influenced by the biased and interested opinion of one of them. 18 Ind. Cas. 92. F-1

(18) Excess of authority by arbitrator.

(a) Arbitrator exceeding his authority is often a good ground for setting the award aside. It is so in all cases unless the bad part is clearly separable from the rest of the award, and does not affect the good part. *Tandy v. Tandy*, 9 Dowl. 1044. G

(b) If the award on matters not submitted to him, the award will be set aside. (*Ibid.*) ; 26 Ind. Cas. 73. H

(19) Award granting costs for filing the same.

Where an award granted costs and charges that may be incurred in filing the award, the award is not bad solely because the arbitrators awarded costs of filing the award—Such inclusion may fairly be regarded as nothing more than a recommendation that the costs referred to be granted. 8 S.L.R. 186 = 27 Ind. Cas. 526. H-1

(20) Excess of authority as to costs.

(a) An award will be set aside if the arbitrator award costs without authority. *Boddle v. Davies*, 3 A. & E. 200. I

(b) Or if he improperly direct costs to be taxed as between solicitor and client. *Seccombe v. Babb*, 6 M. & W. 129 = 9 L.J. (N.S.) Ex. 65. J

(21) Award based partly on private enquiry.

Where the award recites on the face of it, that the arbitrator held, partly on evidence taken before him, and partly on private enquiry, that the will executed by a certain person was genuine; *Held*, that it was not competent for him to do so and the award was vitiated. 18 C.L.J. 299. K

(22) Documents acted upon not disclosed.

An arbitrator acts illegally if he does not disclose to the parties the documents upon which he acts. 26 Ind. Cas. 73. L

(23) Power of arbitrator to do ministerial acts.

Arbitrators have power to do singly acts of a ministerial nature. A mere reception of a written statement by one of the arbitrators is not a judicial act. 15 C.L.J. 260. L

I.—“ Misconducted himself ”—(Continued).

(24) Umpire sitting with interested arbitrator.

Where an umpire sat with arbitrators, one of whom was secretly interested, the umpire's award was set aside. *Blanchard v. Sun Fire Office*, 6 Times L.R. 365. M

(25) Refusal of umpire to reheat evidence.

So also, if the umpire make his award, refusing to reheat the evidence, his decision will be set aside; but the award will be sustained if the parties, by the submission, or by their conduct, have agreed to relieve him from the duty of re-examining the witnesses. *Salkeld and Slater, In re*, 12 A. & E. 767=10 L.J.Q.B. 22. N

(26) Misconduct as to part of award vitiates whole.

When an award determines matters not referred to arbitration and the valid part of the award can be separated from the rest, the award should be declared valid to that extent; but when misconduct is proved, the whole award is invalid. 14 Ind. Cas. 978. O

(27) Arbitrator not liable for want of skill or negligence.

An action will not lie against an arbitrator for want of skill, nor for negligence in making his award, nor for the like cause against an architect, broker or average adjuster employed to determine matters as a quasi-arbitrator, provided that he act honestly. *Turner v. Gouldon*, L.R. 9 C.P. 57=43 L.J.C.P. 60; *Tharsis Sulphur Co. v. Loftus*, L.R. 8 C.P. 1=43 L.J.C.P. 6; *Pappa v. Rose*, L.R. 7 C.P. 535; *Stevenson v. Watson*, 4 C.P.D. 148=48 L.J.C.P. 318; *Chambers v. Goldthorpe*, (1901) 1 K.B. 624=70 L.J., K.B. 482. P

(28) Irregularities amounting to no proper hearing.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator. 36 A. 336 (P.C.)=18 C.W.N. 755=27 M.L.J. 181. P-1

(29) Examination of arbitrator as a witness.

(a) Although an arbitrator cannot be examined to show what he intended by his award, yet, he can give evidence on the question whether a particular portion of his proceedings was an award at all. 6 M.L.T. 187=2 Ind. Cas. 92=19 M.L.J. 394. Q

(b) An arbitrator may be called as a witness to give evidence respecting proceedings in the arbitration. There does not seem any privilege attaching to him in his judicial character, whether he be a legal or lay person, entitling him to refuse his testimony; but where, in an action on an award, the defendant called the arbitrator to prove the ground on which he made his award, in order to show that he had exceeded the limits of the submission, Mansfield, C.J., told the witness that he need not be examined, unless he chose. The arbitrator in consequence declined to be examined. On a motion for a new trial, and cause shown, no objection was made to this decision. *Ellis v. Sallau*, 4 C. & P. 327 n; *Johnson v. Durant*, 4 C. & P. 327. R

(c) An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award, and

I.—“Misconduct himself”—(Concluded).

whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the *quantum* of compensation, or so as to scrutinise the exercise of his discretionary power to award compensation. 14 O.C. 808. §

(30) **Examination of arbitrator as witness.**

An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is properly admissible. But evidence so admitted as relevant on a charge of dishonesty or partiality cannot be used to scrutinise the decision of the arbitrator on matters within his jurisdiction and on which his decision is final, e.g., to criticise methods adopted by him in determining the *quantum* of his valuations, for purposes of partition—a matter within his discretion. 36 A. 326 (P.C.) = 27 M.L.J. 181. § 1

(31) **Statements obtained as bearing on charge of corruption, if admissible to question award on merits.**

Apart from examining its bearing on the charge of corruption, it is beyond the competency of the Court to scrutinise the estimate of value appearing on the face of the award. (*Ibid.*) § 2

(32) **Evidence of arbitrator to explain award.**

(a) An arbitrator may be called as a witness in an action to enforce his award. *Buccleuch (Duke) v. Metropolitan Board of Works*, 41 L.J. Ex. 187 = L.R. 5 H. L. 418. T

(b) He may be asked questions as to what passed before him, and as to the matters presented to him for consideration. (*Ibid.*) U

(c) But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him. (*Ibid.*) V

(33) **No proper enquiry—Burden of proof.**

The burden of proving that there had been no proper enquiry by the arbitrator is on the person who alleges it. 36 A. 326 (P.C.). V.1

2.—“Improperly procured.”(1) **Arbitrator wilfully misled or deceived.**

If either party be guilty of fraudulent concealment of matters which he ought to have disclosed, or if he wilfully mislead or deceive the arbitrator, the award may be set aside. *South Sea Co. v. Bunstead*, 2 Eq. Cas. Ab. 80; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Metcalfe v. Ives*, 1 Atk. 68; *Gartside v. Gartside*, 3 Anst. 735. W

(2) **Arbitrator unexpectedly making award—Misleading of party.**

(a) The arbitrator should be careful not to mislead the parties into a supposition that the case is still open, and then unexpectedly to make his award. For if the arbitrator, after promising to hear some witnesses, make his award without calling them, or giving notice that he shall not examine them, the award will be set aside. *Earl v. Stocker*, 2 Vern. 261. X

2.—“*Improperly procured*”—(Concluded).

- (b) If, after declaring that he can take no further proceedings in the reference till some books of account have been looked into and examined, he make his award without giving notice to the parties that he has found the inspection of the books unnecessary, the award will be set aside. *Pepper v. Gorham*, 4 Moore 148.

Y

(3) **Perjury of witness.**

The Court refused to set aside an award on the ground merely that it was discovered after the award that a material witness had given evidence on another occasion apparently contradictory to that given by him before the arbitrator. *Glasgow, &c. Rail Co. v. London & North Western Rail Co.*, 52 J.P. 215.

Z

(4) **Defendant appointing arbitrators after institution of suit—Propriety of award.**

See 7 S.L.R. 1=20 Ind. Cas. 504 under S. 19, *infra*.

A.

(5) **Disobedience to injunction issued to stay proceedings.**

Where an injunction is issued and they disobey the injunction, the award would be considered to be improperly procured; but where no such injunction has issued, the award cannot be said to be improperly procured merely because of the pending suit relating to the same subject-matter. 4 S.L.R. 187.

B

3.—“*Set aside the award.*”(1) **Setting aside a void award.**

If the award were altogether void, and could be considered a nullity, and nothing could be done upon it but by suit, the Court would not usually set it aside unless some step could be taken to enforce the award which rendered the interference of the Court necessary. *Doe d. Turnbull v. Brown*, 5 B. & C. 384; *Worrall v. Deane*, 2 Dowl. 261.

C

(2) **Award made after expiry of time.**

- (a) An award made after the time for making it has expired might be set aside. *Swinford and Horn, In re*, 6 M. & S. 226.

D

- (b) Unless the conduct of the parties amounted to an enlargement of the period. *Hallett v. Hallett*, 7 Dowl. 389.

E

(3) **Omission to decide all matters in difference.**

The award will be avoided if the award fail to decide on all the matters referred for determination, whether the omission appear on the face of the award, or be shown to the Court by affidavit; but it will not be set aside if the question undecided were not notified to the arbitrator as a matter in defence, or the parties showed by their conduct that they did not mean him to decide it. *Rees v. Waters*, 16 M. & W. 263; *Samuel v. Cooper*, 2 A. & E. 752.

(4) **Portion of award in excess of submission.**

The submission to arbitration furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission. Consequently as the arbitrators are inflexibly limited to a decision of the particular matters referred, if the award extends to matters not within the scope of the submission, it is void

3.—“Set aside the award”—(Continued).

as regards the portion in excess of the submission. 22 C.L.J. 237 = 31 Ind. Cas. 33 ; 16 C.W.N. 256 ; 23 A. 394 (P.C.) ; 29 C. 854 (P.C.) ; *Hill v. Thorn*, (1680) 2 Modern 809 ; *Hids v. Petit*, (1670) 1 Ch. Cas. 185 ; *Price v. Popkin*, (1899) 10 A. and E. 189 ; *Pascoe v. Pascoe*, (1837) 3 Bing (N.O.) 898. F-1

(5) Two awards each deciding part of the matters referred.

When the award is not final it will be set aside. If, without special power, the arbitrator made two awards, each deciding part of the matters referred, and not one entire award on all together, both may be set aside, for there is no one final award on all the subjects. *Winter v. Munton*, 2 Moore 723. G

(6) Decision reserved or delegated.

So it will be avoided if it reserve a point for the future decision of the arbitrator, or delegate the determination of it to another. *Tandy v. Tandy*, 9 Dowl. 1044. H

(7) Delegation of functions by arbitrator.

An arbitrator has no authority to delegate his functions except possibly the performance of what are called ‘ministerial acts,’ and if he does so, he is guilty of judicial misconduct and his award is invalid. 22 C.L.J. 237. H-1

(8) Delegation to stranger alleged—Duty of Court.

(a) When a charge of judicial misconduct is made against an arbitrator in that he delegated his authority to a stranger and the award is in essence not his act, it is incumbent upon the Court to examine him to ascertain whether the allegation is well founded or not. 22 C.L.J. 237. H-2

(b) A Court will be acting with material irregularity in the exercise of its jurisdiction, if an objection of judicial misconduct on the part of the arbitrator is overruled without enquiry and without reception of evidence material for the determination of the issue. (*Ibid.*) H-3

(9) Delegation of authority by one arbitrator to another absolutely.

The award will be set aside if one arbitrator delegates his authority of deciding a point of law to another *absolutely*. *Little v. Newton*, 9 Dowl. 437 = 10 L.J.C.P. 88. I

(10) One arbitrator merely giving up his opinion to another.

The award will not be set aside if the arbitrator merely give up his own opinion to the other. *Eardley v. Steer*, 4 Dowl. 423 = 4 L.J. (N.S.) Ex. 293. J

(11) Executing award separately.

So also if they execute the award separately. *Wade v. Dowling*, 4 E. & B. 44 = 23 L.J.Q.B. 302. K

(12) Award must be definite.

The award must be definite with regard to all points in dispute between parties. 41 C. 313. K-1

(13) Uncertain award may be set aside.

When the award is uncertain it may be set aside, as, for instance, where it is doubtful whether the award has decided the questions referred or how it has determined them. *Morin v. Burge*, 4 A. & E. 973 ; *Tribs and Upperton, In re*, 3 A. & E. 293. L

3.—“Set aside the award”—(Continued).

(14) Uncertainty as to amount.

When the award leaves a disputed amount of money, other than costs, unascertained, it will be set aside. *Marshall and Dresser, In re*, 3 Q.B. 878=12 L.J.Q.B. 104. M

(15) Uncertainty as to persons.

An award which does not specify which of two persons is to do a certain act, will be set aside. *Lawrence v. Hodgson*, 1 Y. & J. 16. N

(16) Directions in award not precise.

The award will be set aside where the arbitrator who is empowered to give general directions as to what shall be done, fails to describe them with sufficient particularity. *Stonehewer v. Farrar*, 6 Q.B. 730=14 L.J.Q.B. 132. O

(17) Award should be capable of being made certain.

(a) If the arbitrator has given rules for calculating the amount of money to be paid without stating the result of such calculation, the award is sufficiently certain, on the principle that that is sufficiently certain which can be made certain. *Broom on Legal Maxims*, 1911, p. 478; 15 C.L.J. 860 (864). P

(b) An award was made that one party should pay to the other all such moneys as he had expended in the prosecution of a suit. The award was held to be sufficiently certain, because the amount could be ascertained from the attorney's bill. *Beale v. Beale*, Cro. Car. 888. Q

(c) The principle applicable to cases of this description is that “where it is laid down as a principle of law that an award should be final, the meaning is not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty.” *Per Cushing, J. in Strong v. Strong*, 9 Cushing 560. R

(d) The division in *Strong v. Strong*, 9 Cushing 560, was to be of certain chattels, the property of a partnership, and it was observed as follows:—

“It is true that the arbitrators did not themselves actually sever the things to be divided, whether hay, grains, utensils or the like. There is nothing in the submission which requires them to effect such actual severance and mechanical distribution of those things. They adjudged in the award that the things should be divided and they decided in what proportion. In many cases, no more is possible to be done, as in an award for the division of partnership effects, which may happen at the time to be abroad or otherwise not in the personal possession of either party and of which the quantity or value is not known; or as in the case of joint interests not in their nature capable at any time of a material severance, like the property in a ship. All these and many other examples, which readily suggest themselves, would seem to show that an award which purports to divide a property between two persons by prescribing a rule of division may well be final though the property in question be not actually divided; nay, though it be incapable of division. S

(e) If the award gives a definite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application. Though possible doubt may attach to the doctrine by reason of the dicta

3.—“Set aside the award”—(Continued).

in some of the English cases, yet, on the whole, it is admitted in those very cases that if the arbitrator makes ‘some regulation upon matters of difference,’ to use the words of Baron Parke, or ‘gives direction’ as to what is to be done, according to the language of Lord Abinger, it is decisive in favour of the award.” (*Ibid.*) T

- (1) Again in the case of *Thor v. Cole*, 2 C.M. & R. 367, reference to extrinsic documents was allowed for the purpose of explaining or determining an amount not named or ascertained in the award otherwise than by reference to such document. The award was that the defendant should pay to the plaintiff’s attorney a certain sum which was paid by him; the bill included charges relating to the plaintiff as well as to another man; the award was sufficiently certain, though it had not determined specifically the plaintiff’s share of the bill, for since it was stated that the bill had already been delivered, it could be ascertained by a reference to it. U

(18) Award inconsistent and repugnant.

When the award is substantially inconsistent and repugnant, it will be set aside. *Ames v. Milward*, 8 Taunt. 637. V

(19) Arbitrator can make only one award.

(a) It is implied in all cases, unless something to the contrary is expressed, or may be inferred from the submission, that the arbitrator can make but one award. *Gould v. Staffordshire Potteries Waterworks Co.*, 5 Ex. at p. 229, *per* Parke, B. W

(b) If there be several arbitrators, they may assemble and settle the specific matters at several days, but their award must be one and entire. *Winter v. Munton*, 2 Moore 723. X

(20) Separate certificates may form one award.

But two separate certificates may form but one award if they were executed at the same time. *Smith v. Reece*, 6 D. & L. 520. Y

(21) Separate awards when valid.

It is perfectly legal for the parties to give the arbitrator power to make several awards, and when so empowered he may include the several matters referred to him distributively in separate awards. *Dows v. Coxe*, 3 Bing. 20=3 L.J. (O.S.) C.P. 127; *Wrightson v. Bywater*, 3 M. & W. 199. Z

(22) Power to make two awards—Finality of awards.

Where an arbitrator had power to make two awards, and in the first to state a case for the opinion of the court and assess damages contingently, but neither party was to enforce payment of any sum found due by the first award until the arbitrator had made his final award, it was considered that the first award was not a final award. *Wood v. The Copper Miner’s Co.*, 15 C.B. 464=24 L.J.C.P. 34. A

(23) False recital in award.

- (a) An arbitrator cannot by a false recital give himself an authority beyond the submission. *Price v. Popkin*, 10 A. & E. 189=8 L.J. (N.S.) Q.B. 198. B
- (b) As a false recital cannot bind the parties beyond the submission, neither will it invalidate the award. *Watkins v. Philpotts*, M’Clel. & Y. 998; *Baker v. Hunter*, 16 M. & W. 672; *Thames Iron Works & Co. v. The Queen*, 10 B. & S. 83. C

3.—“Set aside the award”—(Continued).

(24) Discovery of new material matter.

How far, when there has been no fraud or concealment, the mere discovery of new material matter will be a ground for setting aside the award, does not seem clear, but it has been held that such discovery is a ground for remitting the award to the arbitrator for reconsideration. *Knightley, Maxsted & Co., In re*, (1898) 1 Q.B. 405=62 L.J. Q.B. 105; *Sprague v. Allen*, 15 Times L.R. 150. D

(25) Umpire appointed by lot and not by choice.

- (a) An umpirage, or award of an umpire, may be set aside, if the two arbitrators appoint the former by lot and not by choice. *Cassell, In re*, 9 B. & C. 624. E
- (b) Unless both nominees are acknowledged to be fit to be umpires. *Pescod v. Pescod*, 58 L.T. 76. F
- (c) Or the parties have consented to that mode of appointment. *Tunno and Bird, In re*, 5 B. & Ad. 488; 3 L.J. (N.S.) K.B. 5. G

(26) Arbitrator deciding by lottery.

- (a) Suit for possession of land. The lower Courts dismissed the suit on the ground that there was an award by an arbitrator on reference made to him. As a fact the arbitrator only put a lottery on the parties agreeing to it and he who got the prize ticket had the property. Held, that there was no arbitration, and that there was no decision by the arbitrator which can be called an award. 5 N.L.R. 107=3 Ind. Cas. 55. H
- (b) The agreement to settle the dispute by lottery was *ab initio* void and forbidden by S. 30, Indian Contract Act. (*Ibid.*) I

(27) Unexpected case set up by opponent.

It is no ground for setting aside an award, that a party has been surprised by an unexpected case set up by his opponent on the reference, which he believes not to be true, if he did not apply to the arbitrator to postpone making his award, and to give time for inquiry. *Solomon v. Solomon*, 28 L.J. Ex. 129. J

(28) Award given after a very long time and after notice to revoke submission.

The plaintiff and defendant entered into an agreement submitting their disputes to arbitration on 29th of September, 1905. Shortly after the reference, the arbitrators met and did something in that connection. Nothing, however, was done after that for a long time. On 16th of August 1906 plaintiff served a notice to revoke the arbitration. After the notice the arbitrators met again on the 20th of August and continued to sit for several days. No one took the least notice of the notice of revocation. The award was given on 24th of August, 1906:

Held, that, under the circumstances, the award was not invalid and could not be set aside. 18 Ind. Cas. 48. K

(29) Award made against firm, whether bad.

An award is not bad for the fact that it was made against the name of a firm, without ascertaining who were the parties liable, for the new Civ. Pro. Code provides for suits against firms in the firms' names. 25 Ind. Cas. 955,

3.—“*Set aside the award*”—(Continued).

(30) Award against a firm without ascertaining the persons constituting it.

An award made against a firm, without ascertaining who are the persons that constitute it, is, on the face of it, bad, and no Court can make a decree in such circumstances, upon the award against a firm. 18 C.W.N. 68=1 Ind. Cas. 371. L

(31) Umpire asking promoters to take up award and pay fees.

The Court refused to set aside the award of an umpire, where he had asked the promoters whether they would undertake in any event to take up the award and pay the fees. *Kenworthy v. Queen Insurance Co.*, 9 Times L.R. 181. M

(32) Honest admission of document in violation of rule of evidence.

The honest, though mistaken, admission by an umpire, of a document, in violation of a rule of evidence introduced *pro hac vice* is not a ground for setting aside an award. 15 Bom. L.R. 392=19 Ind. Cas. 934. N

(33) Award erroneous on point of law.

If a specific question is submitted to an arbitrator for his decision and he decides it, the fact that the decision is erroneous on a point of law does not make the award bad in law. *King & Dunneen, In re*, (1918) 11 K.B. 22. N-1

(34) Mistake of law—Inequality of benefit.

An award, which was open to no reproach, but which affected the interests of a minor, was set aside at the minor's instance, on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal:—*Held*, that neither ground was sufficient to invalidate the award: since the validity of the award must be determined in the light of the circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. 12 Bom. L.R. 934 = 8 Ind. Cas. 647. O

(35) *Ex parte* award—Whether can be set aside.

If a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded *ex parte*.

A cause which any Court would regard as good enough for setting aside an *ex parte* decree under O. IX, r. 13, Civ. Pro. Code (1908), will be sufficient for setting aside an *ex parte* award. 8 S.L.R. 110=27 Ind. Cas. 135. P

(36) Arbitrator giving no notice of his intention to enter upon the reference or of the time or place of his doing so.

Where the arbitrator gives no notice to the parties of his intention to enter upon the reference or of the time or place of his doing so and he otherwise acts irregularly in the discharge of his duties, he is guilty of legal misconduct (as distinguished from moral misconduct in the case of corruption, partiality, etc.) and the award must be set aside, and the Court has the power to remit the award to the arbitrator for re-consideration. 41 C. 313. Q

(37) Power of Court to set aside award cannot be taken away by agreement of the parties.

It is not competent for the parties by an agreement to oust the jurisdiction of the Court vested in it by S. 14, Arbitration Act, to set aside an award, if misconduct on the part of the arbitrators were shown, or if it were shown that

3.—“Set aside the award”—(Continued).

the award was improperly procured, when the parties desire that the award should be enforced under the provisions of the Act. 13 C.W.N. 68=1 Ind. Cas. 371.

91

(38) Decision of arbitrator when can be questioned by Court.

The arbitrator allotted to one of the parties properties subject to a heavy charge, but at the same time provided that the mortgage-debt and interest should be a charge on the entire property and each co-sharer was to be liable to pay in proportion to his share and should pay that share to the mortgagees as soon as possible :

Held—that it was not within the province of the Court to decide whether this provision gave full protection to the allottee. The matter having been considered by the arbitrator, his decision could not be questioned by the Court unless the charge of corruption or misconduct was established. 18 C.W.N. 755=19 C.L.J. 494=17 O.C. 120=12 A.L.J. 537=16 Bom. L.R. 418=36 A. 336=23 Ind. Cas. 625=16 M.L.T. 35=(1914) M.W.N. 472=27 M.L.J. 181 (P.C.). R

(39) Submission by contract—Parties refusing to do anything.

In the contracts entered into between the parties, it was provided that all disputes arising out of those contracts shall be referred to the arbitration of the Bengal Chamber of Commerce whose award shall be considered binding. When a dispute arose and was referred to the Chamber by one party, the other party, although repeatedly written to, deliberately refused to do anything. *Held*, that the arbitrators were not bound to further give him an opportunity to be heard. 25 Ind. Cas. 951. S

(40) Party entitled to object to the award.

It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party, in whose favour the erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award on this ground. 15 C.L.J. 110. T

(41) Objections to irregularities in the award when to be made.

Not only irregularities but even ‘improper conduct’ on the part of arbitrators might be waived, and all objections as to irregularities known to the parties before the pronouncement of the award must be made before the delivery of such award. 12 M.L.T. 133=23 M.L.J. 290=(1912) M.W.N. 1091. U

(42) Failure to keep notes of proceedings not objected to till after award.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of proceedings before him; but there is no warrant for holding that, in the absence of such notes, an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied. 36 A. 336 (P.C.). V

(43) Separation of valid and invalid portions of award.

Where an award declared that a person who was not a party to the reference had no right to the property in dispute, and where the decision as regards such

3.—“Set aside the award”—(Concluded).

person was one that could be separated without affecting the other portions of the award, *held*, that the remaining portions of the award remained valid. 12 M.L.T. 133=23 M.L.J. 290=(1912) M.W.N. 1091. W

(44) Agreement not to set aside award for fraud.

It is open to parties to agree that neither party will try to set aside the award for fraud. *Tullis v. Jackson*, (1892) 3 Ch. 411. X

(45) Submission to the arbitration of the Chamber of Commerce—Setting aside award.

Where a party has submitted to the arbitration of the Chamber of Commerce, he cannot be allowed to see the effect of the award and then come to Court to have it set aside, without showing that the rules of the Chamber have not been complied with. 25 Ind. Cas. 955. Y

(46) Order setting aside award—Appeal.

There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. S. 89 of the Civ. Pro. Code, especially excepts the procedure of the Code from arbitrations under the Arbitration Act and S. 4 does the same generally. S. 104 (1) (f) of the Code applies only to arbitrations under the Code. 6 L.B.R. 88=5 Bur.L.T. 155=17 Ind. Cas. 902. Z

15. (1) An award on a submission, on being filed¹ in the Court in accordance with the foregoing provisions, shall (unless to be enforceable as a decree. the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.²

(2) An award may be conditional³ or in the alternative.⁴

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5 if the ring is returned within fourteen days.

(NOTES).**Corresponding English Law.**

The first clause of this section corresponds to S. 12 of the English Arbitration Act, 1889. 52 & 53 Vic. C. 49. A

I.—“On being filed.”**(1) Proceedings to file award—Procedure.**

Proceedings to file an award are litigious proceedings and though not technically suits within S. 10 of the Civil Procedure Code, they are governed by the same principles of general law as are laid down in that section. 4 S.L.R. 187. B

(2) Arbitrator not bound by rules of practice.

(a) An arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts

I.—“On being filed”-(Continued).

of law to do complete justice between the parties according to equity and good conscience. In this view Courts are never astute to entertain technical objections to awards. 15 C.L.J. 110. C

- (b) Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity, and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it, or the rules relating to evidence to be found in the Indian Evidence Act. He may also, in forming his judgment, act upon merely moral considerations of which a Court of law could not take cognizance. 14 O.C. 308. D

(3) **Principles regulating conduct of arbitrator.**

The principles accepted in the English law for regulating the conduct of the arbitrators are not inapplicable to arbitration-proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England. 14 O.C. 308. E

(4) **Award in excess of jurisdiction of the Court in which the suit is pending.**

The pendency of a suit in a Court having jurisdiction limited to Rs. 1,000, is no bar to the filing of an award obtained by the defendants against the plaintiffs for an amount far in excess of Rs. 1,000. 4 S.L.R. 187. F

(5) **Ex parte proceedings taken against one party by arbitrator.**

(a) The mere fact that *ex parte* proceedings have been taken against one party by an arbitrator is not sufficient to justify the summary rejection of the objections to the arbitrator's award filed by that party. Whether *ex parte* proceedings taken by the arbitrator are justified or not, the award made by the arbitrator is one the validity or invalidity of which has to be considered by the Court. 15 Ind. Cas. 57=229 P.W.R. 1912=1 P.L.R. 1913. G

(b) The party, against whom *ex parte* proceedings are ordered by the arbitrator, has every right to an opportunity to file objections to the award which the Court is bound to consider, if they are filed within the time prescribed by law. (*Ibid.*) H

(6) **Power of Court to decree specific performance of award.**

(a) The Arbitration Act, does not expressly interfere with the power of the Court to decree specific performance of an award, and it is therefore presumed that the power still exists, and, when exercised, would be governed by the principles on which the Court of Chancery used formally to decree specific performance. Russell, 9th Ed., 233. I

(b) An action in equity would lie to enforce specific performance of an award, when the thing ordered by the award to be done was such as a Court of equity would specifically enforce, if it had been agreed on by the parties themselves. For, as by the submission the parties had contracted to do what the arbitrator should direct, when the latter had made his decision, the award was considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and would be enforced against a party as the party's own agreement. *Wood v. Griffith*, 1 Wils. C.O. 34. J

I.—“On being filed”—(Continued).

- (7) Specific performance of award not consistent with submission—Enforcement of part of award.

The Court would not enforce an award when the submission and award together constituted an unwise and unreasonable agreement, nor one which was incapable of being worked out consistently with the terms of the submission; and it is very doubtful whether it would enforce part of an award when it could not enforce the whole. *Nickels v. Hancock*, 7 De G. M. & G. 300. K

- (8) Delay in enforcing specific performance of award.

The Court would not compel specific performance of an award, unless the parties came as promptly as the nature of the case would permit. *Eads v. Williams*, 24 L.J. Ch. 581. L

- (9) One of the parties a firm—Right of other party to proceed either against the firm or partners.

(a) Where one of the parties to an agreement to refer disputes to arbitration is a firm, it is open to the other party to proceed with the reference against either the firm, or the individuals composing the firm. 6 S.L.R. 127. M

(b) Where such party elects to proceed against the firm, and obtains an award against the firm, the question whether a particular person is a partner of such firm cannot be considered in the proceedings to file the award, as it does not come within the scope of Ss. 13, 14 or 15 of the Act. Such a question can only be dealt with either in the execution proceedings, or in a separate suit. Where, however, such party elects to select individual members composing the firm, any person alleged to be a member, and denying his liability as such, may, if he likes, appear before the arbitrators, under protest and, whether he has appeared before the arbitrators or not, he may object to the award being filed against him on the ground that it had been improperly pronounced as against him, on the misrepresentation that he was a partner. 6 S.L.R. 127. N

- (10) Action on award.

(i) PROOF OF SUBMISSION.

(a) In an action on an award the plaintiff must prove the submission of all parties to the arbitration, so as to show the authority of the arbitrator. *Ferrer v. Ouen*, 7 B. & C. 427; *Dilley v. Polhill*, 2 Str. 923. O

(b) Although the Indian Arbitration Act, has made the procedure for the enforcement of an award simpler than the old practice of instituting a suit for the purpose, it is still necessary to prove that the arbitrators acted under a valid submission, before an award can be made a decree of Court under the Act. 13 C.W.N. 68=1 Ind. Cas. 871. P

(ii) PROOF OF APPOINTMENT OF UMPIRE.

Where the award is made by an umpire, or by arbitrators and an umpire, the appointment of the latter must be proved. *Still v. Halford*, 4 Camp. 17. Q

(iii) PROOF OF AWARD.

The plaintiff must prove the award, and if made by two or more arbitrators, it must be shown to have been signed by all of them, in the presence of each other, and at the same time and place. *Wade v. Dowling*, 4 E. & B. 44=28 L.J.Q. B. 302; *Peterson v. Ayre*, 15 C.B. 724. R

I.—“On being filed”—(Continued).

(iv) PLEA OF MISCONDUCT OF ARBITRATOR.

The defendant cannot, in an action on an award, plead collusion with a party or other misconduct of the arbitrator in avoidance of the award. *Whitmore v. Smith*, 7 H. & N. 509=31 L.J. Ex. 107; *Wills v. Maccarmick*, 2 Wils. 148; *Brazier v. Bryant*, 10 Moore, 587; *Grazebrook v. Davis*, 5 B. & C. 524; 4 L.J. (O.S.) K.B. 321; *Braddick v. Thompson*, 8 East, 344. See *Thorburn v. Barnes*, L.R. 2 C.P. 384; 36 L.J.C.P. 184. S

(v) PLEA OF MISTAKE OF ARBITRATOR.

In an action on an award, the defendant cannot impeach the award upon the ground of a mistake of the arbitrator. *Hall and Hinds, In re*, 2 M. & G. 847. T

(vi) EVIDENCE TO DISPUTE FACTS FOUND BY AWARD.

In an action on an award, the defendant cannot adduce evidence to dispute the facts found by the award. *Walshaw v. Brighouse Corporation*, (1899) 2 Q.B. 286=68 L.J.Q.B. 828. U

(11) Result of filing award.

Under the provisions of the Arbitration Act, the filing of an award is an act to be done, not on the application of the parties but at the instance of the arbitrators, and, when the award is filed, the result is not that there is a suit in which a decree has been passed but that there is an award which shall be enforceable as though it were a decree. Upon the award being filed, objection may be taken to the award in accordance with the terms of the Act. 17 C.W.N. 395=40 C. 219=18 Ind. Cas. 978. V

(12) Appellate Court directing award to be filed with liberty to file objections.

The order of the Trial Judge refusing the application of one of the parties to file the award in Court, on the ground that it was made out of time and against a firm the names of the members whereof were not ascertained, and so was inoperative, was set aside by the Court of Appeal, and the award was directed to be filed with liberty to the opposite party to file objections. 17 C.W.N. 395=40 C. 219=18 Ind. Cas. 979. W

(13) Award not filed in Court—Whether it can be pleaded in subsequent suit.

An award of arbitrators can none the less be pleaded in a subsequent suit, and if valid must be given effect to, though no application for filing it in Court has been made, or such application has been unsuccessful, if its validity has not been actually put in issue on such application. 18 C. 414 (P.G.); 6 N.L.R. 1=5 Ind. Cas. 425. X

(13-a) Award not filed in Court—Title of persons under award to property.

The title of persons entitled to a property under an award of arbitrators cannot be impugned because the award was not filed in Court, or because no deed of conveyance had been executed to give effect to its terms. 18 O.C. 282. Y

(14) Award to be pleaded as discharge of right to sue.

An award must be pleaded specially as a defence when it is relied upon as a discharge of the right to sue. *Russell*, 9th Ed., 327. Z

(15) Suit for debt—Award directing payment pleaded.

(a) If an action were brought for a debt, an award respecting the claim, ascertaining the amount of the debt, and directing payment, could not be pleaded

1. —“On being filed”—(Concluded).

in bar to the action without alleging performance. *Allen v. Milner*, 2 C. & J. 47=1 L.J. (N.S.) Ex. 7; *Roulstone v. Alliance Insurance Co.*, 4 L.R. Ir. C.L. 547. A

(b) In all actions where accord and satisfaction was a good defence, an award might be pleaded in bar. *Com. Dig. Accord D. 1: Blake's case*, 6 Rep. 43b; *Evo. Ab. Arb. G.* B

(16) Arbitration clause in a wagering contract—Award—Validity.

(a) An arbitration clause contained in an agreement, which purports to be a genuine forward contract, but which really is by way of wager, is void and unenforceable. 1 S.L.R. 123. C

(b) It is nevertheless open to the parties to carry it out, and if once an award is passed thereon, the grounds on which the Court will set aside an award are quite different from those on which it will grant leave to revoke a submission. 1 S.L.R. 123. D

(c) Before an award based on such a submission is passed, the plaintiff has a right to ask for an injunction restraining arbitration proceedings, and the Court must, in view of the terms of S. 30, Indian Contract Act, and Act III of 1865, grant relief to the plaintiff, though he be entitled to no sympathy. 1 S.L.R. 123. E

(16-a) Costs incurred in filing the award—Discretion of Court.

All costs incurred in the process of obtaining an order from the Court to file the award are within the discretion of the Court and outside the province of the arbitrator. 8 S.L.R. 136=27 Ind. Cas. 526. F

(17) Costs of reference not taxed before action.

When the award gives the costs of the reference but does not fix the amount, they need not be taxed before an action be commenced to recover them. *Holdsworth v. Wilson*, 82 L.J.Q.B. 289=3 B. & S. 1; *Lewis v. Rossiter*, 44 L.J. Ex., 186; *Metropolitan District Rail. Co. v. Sharpe*, 5 App. Cas. 425=50 L.J.Q.B. 14. G

(18) Suit for costs of award.

Where two parties agree to employ an arbitrator, and one pays a sum to take up the award, he may, in the absence of any provision to the contrary, recover a moiety from the other party in an action for money paid. *Marsack v. Webber*, 6 H. & N. 1. H

(19) Award on a balance of account—Interest on sum awarded.

Where money due on a balance of account was awarded to be paid, in an action on the award, interest might be recovered from the time the sum was demanded. *Pinkhorn v. Tuckington*, 3 Camp. 468; *Churcher and Stringer, In re*, 2 B. & Ad. 777. I

2.—“Enforceable as if it were a decree of the Court.”

(1) Specific performance of agreement to arbitrate—Enforcement of award.

Although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an award when validly made. 10 C.W.N. 815=33 C. 1237; *Hodsdon v. Harridge*, 2 Saund 62 b. n. 5. J

(2) Award enforceable as a judgment.

The performance of an award made on a submission as defined by the Arbitration Act, may be enforced in the same manner as a judgment or order to the same effect by virtue of this section. *Caucasian Trading Corporation, Ex parte*, (1896) 1 Q.B. 268=65 L.J.Q.B. 346. K

2.—“Enforceable as if it were a decree of the Court”—(Continued).

(3) Stay of execution of award pending decision of a suit between the same parties.

An award passed under this Act can be enforced as if it were a decree of the Court; but the stay of its execution cannot be ordered under O. XXI, r. 29 of the C.P.C., 1908. 12 Bom. L.R. 860. L

(4) Suit on award—Plea of want of jurisdiction in arbitrators.

In a suit to enforce an award, it is open to the defendant to urge and show that the award is not binding upon the parties for want of jurisdiction in the arbitrators. 11 Bom. L.R. 406=38 B. 401=2 Ind. Cas. 431. M

(5) Award directing partition effects severance of joint interests.

An award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. When it directs partition to be effected, it dissolves the joint family; and from the moment of its date, it severs their joint interests. 11 Bom. L.R. 406=38 B. 401=2 Ind. Cas. 431. See, also, 18 C. 414; 11 Bom. L.R. 20. N

(6) Order of Court appointing Commissioner to effect partition.

An order appointing a Commissioner to effect partition is not an enforcement of the award within the meaning of this section. 6 S.L.R. 146. O

(7) Award affecting property out of British India.

An award affecting property in a Native State cannot be converted into a decree by a British Indian Court so far as that property is concerned. 11 P.W.R. 1910=84 P.R. 1910=5 Ind. Cas. 597=183 P.L.R. 1910. P

(8) Award declaring shares—Execution.

An award declaring the shares to which the parties to the reference are entitled in certain property is a declaratory award and incapable of execution. 6 S.L.R. 146. Q

(9) Decree following an award—Effect.

A decree following an award where the arbitration has been regularly and properly held and where the case has been properly fought out, ought to be just as efficacious as a decree where there is no submission. *Per Richards, C.J.* 9 A.L.J. 778. R

(10) Reference voidable—Acquiescence.

If a party had voluntarily acted upon the reference and voluntarily appeared before the arbitrator, he would be held to have acquiesced in the reference, although it had been voidable at his option. But where coercion and undue influence are stated to have continued even during the proceedings, his conduct would not amount to acquiescence. 6 S.L.R. 146. S

(11) Whether parties can nullify an award.

In order that the parties to an award should be remitted to their previous rights, it is not enough that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. 11 Bom. L.R. 20=5 M.L.T. 226=1 Ind. Cas. 105. T

2.—“*Enforceable as if it were a decree of the Court*”—(Concluded).

(12) Award by whom to be filed and how to operate.

Under the provisions of the Arbitration Act, the filing of an award is an act to be done, not on the application of the parties but at the instance of the arbitrators, and, when the award is filed, the result is not that there is a suit in which a decree has been passed but that there is an award which shall be enforceable as though it were a decree. Upon the award being filed, objection may be taken to the award in accordance with the terms of the Act. 17 C.W.N. 395=18 Ind. Cas. 978=40 C. 219. T₁

(13) Arbitrator holding property claimed to be exclusive, as joint—Decision if binds owner.

An arbitrator appointed by the parties to partition their joint estate decided that a house claimed by one of the parties to be exclusively hers was in fact joint and allotted it to one of the other parties.

Held—that the decision whether right or wrong did not in this case support the inference that he was actuated by dishonest motive. If he was wrong, the allottees would suffer as the award could have no effect whatever in defeating the title of the true owner. 36 A. 386 (P.C.). T₂

3.—“*Award may be conditional.*”

(1) Conditional award.

Where the lease of certain premises was awarded to the defendant, and it was provided that, if the rent awarded to be paid by him were not paid, the award should be void as to his enjoying the lease, the Court held the award good, notwithstanding the conditional award as to the lease, for it became absolute if the defendant paid the rent, and if he did not, he lost the enjoyment by his own default. *Furser v. Prod*, Oro. Jac. #23. U

(2) Award conditioned to be good on obtaining consent of third party.

A direction to do an act on the premises of a third party, though void if absolute, would be good if made conditional on obtaining the consent of the owner of the land. *Turner v. Swainson*, 1 M. & W. 572=5 L.J. (N.S.) Ex. 266, Y

(3) Award conditioned to be void on a certain event.

If an award contain a proviso that it shall be wholly void on the happening of a certain event, whether that event be within the control of the parties to the reference or not, the award will be bad *in toto* for, by adding the proviso, the arbitrator has prevented his decision being a certain and final determination of the matters in dispute. *Kinge v. Fines*, Sid. 59; *Vin. Ab. Arb. H.* 18; *Sherry v. Richardson*, Pop. 15. W

4.—“*In the alternative.*”

(1) Alternative award.

(a) An award in the alternative is sufficiently certain and final. *Russell*, 9th Ed., p. 200. X

(b) Thus an award to pay £100 at such a day, or if the party do not pay it by the day, to pay 110 £ at a future day, is good, for the additional payment is in the nature of a penalty, which the arbitrator has a power to impose. (*Ibid.*) Y

(c) So, an award is good which orders a party to pay a certain sum by instalments on several days, and if he fail on the first day, to pay the whole sum. *Kockill v. Witherell*, 2 Keb. 898. Z

4.—“*In the alternative*”—(Concluded).

- (d) An award that the defendant should pay the plaintiff £100 by such a day, or should find two sureties to be bound with him to the plaintiff to pay the £100 by £20 a year until the whole be paid, was held a good award as to the former part, but void as to the latter, and not even to give the defendant the liberty of electing whether he would pay the £100 at once, or find the sureties to secure the yearly instalments. *Oldfield v. Wilmer*, 1 Leon 140, 304. A

(2) Alternative award—One alternative uncertain or impossible.

If an award direct one of two things to be done, and one of them be uncertain or impossible, the award is nevertheless sufficiently certain and final if the second alternative be certain and possible; and it will be incumbent on the party to perform the second alternative. *Simmons v. Swaine*, 1 Taunt. 549. B

Power to remove arbitrator or umpire. 16. Where an arbitrator or umpire has misconducted himself,¹ the Court may remove him.

(NOTES).

Corresponding English Law.

This section follows verbatim the provisions of cl. 1 of S. 11 of the English Arbitration Act, 1899, 52 and 53 Vic., C. 49. C

I.—“*Has misconducted himself.*”

(1) Arbitrator obtaining assurance of a party to take up award.

The fact that an arbitrator has asked for and obtained the assurance of one of the parties before him that he will take up the award in any event, is not an act of misconduct calculated to create bias. *Re Kenworthy and Queen Insce. Co. Arbn.*, 9 Times. Rep. 181. D

(2) Giving evidence while arbitration is pending.

It is not misconduct for an umpire who is a surveyor to give evidence, while the arbitration is pending, on the value of land which is similar in situation to the land on which he is called upon to decide as umpire. *Re Haigh and L. & N.W.R. Arbn.*, (1896) 1 Q.B. 649. E

(3) Making improper order for costs.

It is not misconduct for an arbitrator who is misinformed as to his powers, to make an order as to costs which is *ultra vires*. *Schofield v. Allen*, 116 L.T.Jo. 240. F

(4) Inspecting subject of valuation accompanied by one party only.

In an arbitration as to the value of a farm, each of two arbitrators was requested, with the assent of both parties, to make a separate valuation on behalf of the party who had nominated him. One of the arbitrators inspected the farm once only, in the company of the party who had nominated him, and in the absence of the other party. Subsequently the arbitrators compared their valuations, and without calling further evidence made their award. Held—that the award must be set aside on the ground of misconduct of the arbitrator who had inspected the farm accompanied by one party only. *In re Arbitration between Brien and Brien*, (1910) 2 I.R. 84—Div. Ct. Ireland. G

I.—“Has misconducted himself”—(Concluded).

- (5) Witness called by arbitrator against will of either of the parties to the arbitration.

An umpire or a single arbitrator occupies a judicial position and has no power himself to call witnesses to act against the will of either of the parties to the arbitration; and in doing so he is guilty of legal misconduct which may justify his removal from his office. *In re Enoch and Zaretsky, Bock & Co.’s Arbitration*, (1910) 1 K.B. 327 = 79 L.J.K.B. 363 = 101 L.T. 801. H

- (6) Refusal of arbitrator to alter date of arbitration.

Where an arbitrator refused to alter the date of an arbitration, as he was requested to do, because the principal witness of one of the parties was leaving England prior to that date, an application to remove him was dismissed with costs. *Re Whitwham and the Wrexham, &c., Ry. Co. Arbn.*, 39 Sol. Jo. 692. I

- (7) Refusal of request to state a case or to delay award until order from Court.

S. 10 (b) of the Act impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrator to state, at any stage of the proceedings, in the form of a special case for the opinion of the Court, and this right must be respected by arbitrators. If, therefore, a party to an arbitration *bona fide* requests the arbitrator to state a case, or to delay making his award until the party can apply to the Court for an order directing a case, and the arbitrator refuses to comply with either request, he is *prima facie* guilty of misconduct such as would justify the Court in setting aside the award, or in remitting it to the arbitrator for further consideration under S. 13. *Palmer and Hoshen, In re*, 67 L.J.Q. B. 1 = 1 Q.B. 131 = 77 L.T. 360 = 46 W.R. 49 = 14 T.L.R. 28. J

- (8) Arbitrator expressing opinion before entering upon reference.

An arbitrator does not necessarily misconduct himself by expressing an opinion on the subject matter of a reference before formally entering upon it, even though such expression is made in writing, and is identical in terms with the award finally made. *Hutchinson v. Hayward*, 15 L.T. 291. K

17. Any order made by the Court under this Act may be made on Costs,¹ such terms as to costs or otherwise as the Court thinks fit.

(NOTES).

Corresponding English Law.

This section corresponds to S. 20 of the English Arbitration Act, 1889, 52 and 53 Vic., C. 49. L

Analogous Indian Law.

Compare Rule 13, Sch. II, Act V of 1908. M

I.—“Costs.”

- (1) Amount of costs to be stated by award—Taxation.

The amount of the costs to be paid must be ascertained and stated in and by the award, itself; otherwise the costs of the reference and award, including the arbitrators’ fees, are liable to taxation in the ordinary course. *Prebble and Robinson, In re*, 2 Q.B. 602 = 67 L.T. 267 = 41 W.R. 30 = 57 J.P. 54. N

I.—“Costs”—(Concluded).

(2) Fresh taxation after remission of award.

The costs of a reference had been taxed before the award was sent back to the arbitrator by the Court. After the second award the defendant demanded the same costs without any new taxation:—*Held*, that by the reference back the allocatur became null, and that there ought to have been a fresh taxation after the new award before any demand for costs could be enforced. *Johnson v. Latham*, 2 L. & M. & P. 205 = 20 L.J. Q.B. 286. O

(3) Award making no mention of costs.

Where the arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs, it was held that the award was bad. *Richardson v. Worsley*, 5 Ex. 618 = 19 L.J. Ex. 317. P

(4) Costs left to the discretion of arbitrators settled by umpire.

If the submission leaves the costs in the discretion of the arbitrators, who have power to choose an umpire, the award is good if the amount of the costs is settled by the umpire. *Taylor v. Dutton*, 1 L.J.K.B. 158. Q

18. The forms set forth in the second schedule, or forms similar thereto, with such variations as the circumstances of Forms. 1 each case require, may be used for the respective purposes there mentioned, and, if used, shall not be called in question.

(NOTES).

I.—“Forms.”

(1) Form of award.

With regard to the substance of the award, any form of words that amounts to a decision of the questions referred will be good as an award. No technical expressions are necessary. *Eardley v. Steer*, 4 Dowl. 428 = 4 L.J. (N.S.) Ex. 298. R

(2) Forms—Examples.

(a) The words, “I have surveyed and estimated the several works necessary to be done in repairing the dilapidations to the house, and find the same amount to 55/- £ 5 s.,” were held a conclusive award. *Whithead v. Tattersall*, 1 A. & E. 491. S

(b) So the words, “I am of opinion that A is entitled to claim of B 194 £ for non-performance of his contract,” was held a sufficient award. *Matson v. Trower*, 1 Ry. & Mo. 17. T

(3) Decision should be clear.

The arbitrator should be precise and clear in his adjudication. *Russell*, 9th Ed., 192. U

(4) Award need not specify matters in difference.

(a) It is not necessary that the award should specify what the matters in difference are. *Smith v. Hartley*, 10 C.B. 800; 20 L.J. C.P. 169. V

(b) The arbitrator should exercise his discretion as to whether in the particular case it is advisable to set them out. In some cases it would be convenient that the recital should specify the subjects in difference, and that the disposing part of the award should refer to them. *Brown and Croydon Caman Co., In re*, 9 A. & E. 522. W

I.—“Forms”—(Concluded).

(5) False recital in award—Effect.

- (a) An arbitrator cannot by a false recital give himself an authority beyond the submission. *Price v. Popkin*, 10 A. & E. 189. X
- (b) A false recital does not invalidate an award. *Baker v. Hunter*, 16 M. & W. 672. Y

(6) Mistakes that do not vitiate the award.

An award is not vitiated by a mistake

- (i) as to the Christian name of one of the arbitrators. *Trew v. Burton*, 1 C. & M. 533.
- (ii) as to the appointment of the umpire. *Adams v. Adams*, 2 Mod. 169.
- (iii) as to the number of arbitrators by whom the award was executed. *White v. Sharp*, 12 M. & W. 712.
- (iv) as to the date of the submission. *Dole v. Dawson*, 2 Keb. 878.
- (v) as to the date of an enlargement of time. *Lloyd and Spitile, in re*, 6 D. & L. 531.
- (vi) as to the extent of the subject matter. *Paull v. Paull*, 2 C. & M. 235.
- (vii) as to the arbitrators having considered the decision of the umpire where the umpire was not consulted at all. *Harlow v. Reed*, 3 D. & L. 203. Z

19. Where any party to a submission to which this Act applies, or any person claiming under him¹, commences any

Power to stay legal proceedings² against any other party to the proceedings where there is a sub-³mission, or any person claiming under him, in respect of any matter agreed to be referred⁴, any party to such legal proceedings⁴ may, at any time after

appearance and before filing a written statement or taking any other steps in the proceedings⁵, apply⁶ to the Court to stay the proceedings; and the Court⁷, if satisfied that there is no sufficient reason why the matter should not be referred⁸ in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration⁹, may make an order staying the proceedings¹⁰.

(NOTES).

(1) Corresponding English Law.

This section is almost a verbatim reproduction of S. 4 of the English Arbitration Act of 1893, 52 & 53 Vic., C. 49. A

(2) Analogous Indian Law.

Compare Rule 18, Sch. II, Act V of 1908. B

(3) Applicability of the section.

(a) This section applies only where there has been a submission to arbitration before the commencement of legal proceedings. 11 Bom. L.R. 1060=34 B. 872=25 C. 199. C

(b) S. 19 has no application to a case where there has already been a valid reference; it merely provides machinery for indirectly compelling such a reference. A defendant who has already made a reference is, therefore, under no necessity to apply for stay of suit under S. 19. 7 S.L.R. 1=20 Ind. Cas. 504. D

1.—“*Party to a submission....or any person claiming under him.*”(1) **Trustee in bankruptcy whether may apply.**

It is doubtful whether the words “party to a submission, or any person claiming through or under him,” apply to the trustee in bankruptcy of a party to a submission, whether as plaintiff or as defendant to the action. *Pennell v. Walker*, 18 C.B. 651; *Piercy v. Young*, 14 O.D. 200. E

(2) **Defendant having a bona fide counter-claim may apply.**

A defendant who is sued for a claim within the agreement to refer, and who, though unable to dispute the claim, has a bona fide counter-claim, also within the agreement to refer, is entitled to apply for a stay of the action. *Russell v. Pellegrini*, 26 L.J.Q.B. 75. F

2.—“*Commences any legal proceedings*”.(1) **Suit commenced prior to award—Injunction.**

(a) Where a suit covering the disputes submitted to arbitration has been commenced, prior to the award, in a Court of competent jurisdiction, an injunction will not as a rule issue. 4 S.L.R. 187. G

(b) In such a case the arbitrators proceed at their own risk. Their award may become nugatory and they may not recover their costs, as the award may prove valueless and may not be taken up. (*Ibid.*) H

(2) **Award subsequent to action.**

Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, and is pending, no application to stay the action having been made under this section or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid, and will not afford a defence to the action. *Doleman and Sons v. Ossett Corporation*, (1912) 9 K.B. 257=81 L.J.K.B. 1092=107 L.T. 581. I

(3) **Award procured during pendency of suit—Subsequent Judgment of the Court in the suit—Effect.**

An award procured by one of the parties during the pendency of a suit could have no operation inconsistent with the judgment and decree of the Court given in the suit, and the result of the suit being unknown at the time of the passing of the award, the award falls short of complete validity and is, therefore, ineffective. 1 S.L.R. 256. J

(4) **Proceeding with reference after notice of suit.**

Proceeding with a reference after notice of the filing of a suit is improper. 1 S.L.R. 256. K

(5) **Contract to submit—Subsequent institution of suit—Effect.**

Where a written agreement for the sale and purchase of goods contains an arbitration clause, each party is under a contractual obligation to refer any dispute which arises to arbitration. If, after dispute arising, either party institutes a suit, he thereby commits a breach of contract embodied in the arbitration clause; but, at the same time, he submits to a competent tribunal the decision of the dispute; for the jurisdiction of the Court is not ousted by an arbitration clause. The position of the defendant after

2.—“*Commences any legal proceedings*”—(Concluded).

the institution of the suit is that he can either sue for damages for breach of contract to refer, or indirectly enforce specific performance of the contract by obtaining an order staying the proceedings, under S. 19. But he must not, after suit, and before stay of the proceedings, attempt to oust the jurisdiction of the Court by appointing arbitrators. If he do so and an award is made, he would be guilty of improperly obtaining an award within the meaning of S. 14. Where, before suit, there has been a valid reference of the dispute to named arbitrators, in pursuance of the terms of the arbitration clause, and the reference has been accepted, a competent tribunal has been constituted, and the submission of the dispute to that tribunal is irrevocable except by leave of the Court. 7 S.L.R. 1=20 Ind. Cas. 504. L

3.—“*In respect of any matter agreed to be referred.*”(1) *Court to act on the agreement.*

It is the *prima facie* duty of the Court to act upon the agreement; see remarks, of L.C. in *Willesford v. Watson*, L.R. 8 Ch. p. 480; and *Denton v. Legge*, 73 L.T. 626. M

(2) *Suit with reference to matter within submission.*

Where an agreement provides that matters in dispute shall be referred to three persons, one to be appointed by each of the parties and third by the two so chosen, and one of the parties brings an action against the other party with reference to a matter in dispute under the agreement, the Court has power, under this section, to stay the action. *Manchester Ship Canal Co. v. Pearson*, 69 L.J. Q.B. 852=2 Q.B. 606=88 L.T. 45=48 W.R. 689. N

(3) *Dispute not within contract.*

(a) Where an action was brought alleging unfair conduct by defendant to defeat the contract, the Court refused to stay, as it was not a dispute within the contract. *Nobel, &c. v. Stewart*, 6 Times L.R. 378. O

(b) The Court refused to stay an action brought to wind up a partnership on the application of the defendant, who had insisted on a right to carry on the partnership business after the dissolution of the partnership, on the ground that the defendant's conduct did not come within the clause in the partnership deed that all disputes relating to the business should be referred. *Dennehy v. Jolly*, 22 W.R. 449. P

(4) *Substantial part of plaintiffs' cause of action not within submission.*

So the Court also declined to stay where a substantial part of the plaintiff's cause of action was not within the submission. *Workman v. Belfast Harbour Commissioners*, (1899) 2 Ir. R. 384; See *Ires v. Willans*, (1891) 2 Ch. 478. Q

(5) *Collateral agreements to refer.*

The power to stay hereunder applies not only to a general agreement in a deed or instrument that all differences arising under it should be referred, but also to agreements to refer collateral to the deed or instrument under which the dispute arose. *Randell v. Thompson*, 1 Q.B.D. 745; *affirming Mason v. Haddan*, 6 C.B., N.S. 526; *overruling Blythe v. Lafone*, 28 L.J. Q.B. 164. R

(6) *Agreement to refer incorporated in the bill of lading.*

A charter party contained a submission to refer disputes, and the subsequent bill of lading contained the words “all the terms and exceptions contained

3.—“In respect of any matter agreed to be referred”—(Continued).

in which charter party or freight contract are incorporated and form part hereof.” Held, that as the charterers and holders of the bill of lading were the same persons, the agreement to refer was incorporated into the bill of lading. Stay ordered. *Temperley & Co. v. Smyth & Co.*, (1905) 2 K. E. 791; (*Runciman & Co. v. Smyth & Co.*, 20 Times Rep. 625, D.). S

(7) Lease containing arbitration clause.

Where, shortly before the expiration of a lease containing an arbitration clause, it was agreed that the lessees should continue as tenants-at-will, it was held that the arbitration clause applied to the tenancy at will. *Morgan v. Wm. Harrison, Ltd.*, (1907) 2 Ch. 137. T

(8) Validity of submission.

To give the Court jurisdiction hereunder, there must be a subsisting agreement to refer capable of being enforced. *Deutsche Springstoff, &c. v. Prisse,* 20 Q.B.D. 177. (*Randell v. Thompson*, 1 Q.B.D. 748, F.). U

(9) Submission whether takes away right of suit.

(a) A reference to arbitration under the Act does not exclude the right of the parties to have recourse to the ordinary tribunals. 1 S.L.R. 255. V

(b) The Indian Arbitration Act by S. 19 provides a special remedy by permitting a party to a submission to plead the submission in bar of a suit instituted by another party to the submission. Therefore, if there is a valid submission, the proper remedy is to apply under S. 19 of the Act for stay of proceedings. 4 S.L.R. 149. W

(10) Agreement to refer, when no bar to suit.

Where defendant has made no application to stay the suit under S.19 of the Arbitration Act or under S. 18, Sch. II of the Civ. Pro. Code, the agreement to refer to arbitration is no bar to the present suit. 37 P.R. 1912=190 P.W.R. 1912=15 Ind. Cas. 402. X

(11) Submission gives right to apply for stay of proceedings.

(a) If any party to the reference files a suit in respect of the subject-matter of the reference, the other party may apply for a stay of proceedings under S. 19 of the Act. 1 S.L.R. 255. Y

(b) Failing such application, or in the event of such application being refused, the parties have no alternative but to submit to the jurisdiction of the Court. (*Ibid.*) Z

(12) Fraud and dishonesty do not oust the jurisdiction of arbitrator.

Fraud and dishonesty on the part of the arbitrator amount only to misconduct on his part which may afford good ground for setting aside the award and do not affect his jurisdiction. 5 S.L.R. 240. A

(13) Agreement to oust jurisdiction of Courts.

(a) The parties cannot by an agreement to refer oust the jurisdiction of the Courts, but they may agree to impose as a condition precedent to any right of action that, with respect to the liability to pay, the mode of settling the amount to be paid, or the time for paying the same, an arbitration shall first be held. *Scott v. Avery*, 5 H.L.C. 811=25 L.J. Ex. 208; *Tredwen v. Holman*, 1 H. & C. 72=31 L.J. Ex. 898; *Russell v. Pelegreini*, 6 E. & B. 1020=26 L.J.Q.B. 75; *Braunstein v. Accidental*

3.—“*In respect of any matter agreed to be referred*”—(Concluded).

Death Insurance Co., 31 L.J.Q.B. 17; *Weswood v. Secretary for India*, 11 W.R. 261; *Elliott v. Royal Exchange Assurance Co.*, L.R. 2 Ex. 237; *Sharpe v. San Paulo Rail Co.*, L.R. 8 Ch. 597; *Edwards v. Abercayon Mutual Ship Insurance Society*, 1 Q.B.D. 563; *Collins v. Locke*, 4 App-Cas. 674=48 L.J.P.C. 68; *Trainor v. Phoenix Fire Insurance Co.*, 65 L.T. 835; *Scott v. Mercantile &c. Insurance Co.*, 66 L.T. 811; *Caledonian Insurance Co. v. Gilmour*, (1893) A.C. 85. B

- (b) To give effect to such an agreement it must appear that the matter proposed to be referred is a difference within the agreement. *Russell*, 9th Ed., p. 61. C

(14) Governing principle.

The governing principle seems to be that, if there is an absolute covenant to pay, and a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover. *Viney v. Bignold*, 20 Q.B.D. 172; 57 L.J.Q.B. 82; see *Roper v. Lendon*, 1 E. & E. 825; 28 L.J.Q.B. 260; *O'Connor v. Norwich Union Fire & Life Insurance Society*, (1894) 2 I.R. 723. D

(15) Plea of agreement to refer.

Where a tenant covenanted not to keep an injurious quantity of rabbits and hares, and, if he kept such injurious quantity, to pay a reasonable compensation, to be settled, in case of difference, by arbitration, it was held on appeal, reversing the judgment of the Exchequer, that the lessor could not be prevented from suing for injury from excess of ground game by reason of the arbitration clause. *Dawson v. Fitzgerald*, 1 Ex. D. 257=45 L.J. Ex. 898. E

(16) Arbitration condition precedent.

(a) Where a tenant agreed to deliver up a house and furniture in good order, and in case of damage to pay for the same, the amount of such payment, if disputed, to be settled by two valuers, the fixing of the amount by the valuers was held to be a condition precedent to the landlord's right to bring an action for the damage when disputed. *Babage v. Coulburn*, 9 Q.B.D. 285; 51 L.J.Q.B. 638, and *Dawson v. Fitzgerald*, was distinguished on the ground that in that case the covenant not to keep an excess of game was separate and independent of the arbitration clause. F

(b) When such an agreement has been acted on, and an award has been made, the jurisdiction of the Courts over the matter decided by the arbitrator ceases. *Cleworth v. Pickford*, 7 M. & W. 314, *per Abinger*, C.B. 321. G

(c) A rule making the settlement of the amount of loss on a policy of insurance by arbitration a condition precedent to bringing an action on the policy does not compel the party to submit to arbitration the question, whether the policy is not void by reason of a misrepresentation as to the condition of the ship. *Alexander v. Campbell*, 41 L.J.Ch. 479. H

4.—“Any party to such legal proceedings.”

Whether all parties must join in applying.

It is not necessary for all parties to join in the application to stay proceedings in the suit. *Willesford v. Watson*, 42 L.J. Ch. 447= L.R. 8 Ch. 473=26 L.T. 428=21 W.R. 350. I

5.—“Steps in the proceeding.”

(1) “A step in the proceedings,” meaning.

“A step in the proceedings” means some application to the Court and not verbal or written communications between the solicitors of the parties. *Ives and Barker v. Willans*, 63 L.J. Ch. 521=2 Ch. 478=7 R. 243; 70 L.T. 674=42 W.R. 488. J

(2) Applications amounting to steps.

(a) An application to a master for security for costs. *Adams v. Cattley*, 66 L.T. 687. K

(b) Obtaining an order for the delivery of interrogatories, and the issue of a summons for particulars of counter-claim. *Chappell v. North*, (1891) 2 Q.B. 252=60 L.J.Q.B. 554. L

(c) Attending at chambers on the hearing of a summons for directions, on which an order was made without objection. *County Theatres & Hotels v. Knowles*, (1902) 1 K.B. 480=71 L.J.K.B. 351; *Richardson v. Le Maitre*, (1903) 2 Ch. 222=72 L.J.Ch. 779=88 L.T. 626. M

(d) Taking out a summons for further time to deliver a written statement in taking a step in the proceedings. 11 C.W.N. 306=84 C. 448. See, also, *Ford's Hotel Co. v. Bartlett*, (1896) A.C. 1=65 L.J.Q.B. 166. N

(3) Applications not amounting to steps in the proceedings.

(a) The demand for a statement of claim. *Ives v. Willans*, (1894) 2 Ch. 478=63 L.J. Ch. 521. O

(b) Obtaining from the plaintiff an extension of time for delivery of defence. *Brighton Marine, &c., Co. v. Woodhouse*, (1893) 2 Ch. 486=62 L.J. Ch. 697. P

(c) The mere filing of affidavits in answer to a motion for a receiver. *Zalinoff v. Hammond*, (1898) 2 Ch. 92. Q

(d) Proceedings taken by a party to a suit to stay legal proceedings under the provisions of this section are not steps “in the proceedings.” 8 Bom. L.R. 955=31 B. 236. R

(4) Negotiations between parties or solicitors.

Negotiation or correspondence between parties or their solicitors does not constitute a step in the action, but an application by summons or motion does. *Bartlett v. Ford's Hotel Co.*, (1895) 1 Q.B. 850, affirmed by *H. L. Ford's Hotel Co. v. Bartlett*, (1896) A.C. 1. S

(5) Acquiescence in an order to produce documents.

Attendance before the Master and acquiescence without protest in an order which is made subject to the production of a certain document to the Master which is ultimately produced is taking a step in the proceedings, and the defendant is thereby precluded from moving to stay proceedings under the section. *Cohen v. Arthur; Cohen v. Cohen*, 56 Sol. Jo. 344. T

6.—“*Apply.*”

(1) Effect of cl. 18 of Sch. II (Act V of 1908) on this section.

In places where the Indian Arbitration Act is in force, an application for stay of suit must be made under S. 19 of this Act, and not under cl. 18 of Sch. II of the Code of Civil Procedure (Act V of 1908). 3 S.L.R. 162. U

(2) Application to stay proceedings, when should be made.

The application for a stay under this section must be made “before delivering any pleadings or taking any other steps in the proceedings.” Russel, 9th Ed., p. 48. V

7.—“*The Court.*”

Jurisdiction of the High Court to stay proceedings in the Court of the Small Causes.

The ‘legal proceedings’ referred to in this section does not necessarily mean legal proceedings in the High Court alone. S. 19 of this Act gives jurisdiction to the High Court to stay proceedings in any Court in the Presidency town subordinate to its jurisdiction. It does not indicate that the legal proceedings contemplated must, in Presidency towns, be proceedings in the High Court and not in any other Court subordinate to it in that town. 8 Bom. L.R. 955=31 B. 236. W

8.—“*Sufficient reason why the matter should not be referred.*”(1) Sufficient reason for stay—*Onus of proof.*

Unless some reason is shown why the matters ought not to be referred, the Court will presume that there is none, and the *onus* of showing that the case is not a fit one for arbitration is thrown on the person opposing the application to stay proceedings. *Hodgson v. Rail. Pass. Ass. Co.*, 9 Q.B.D. 188. X

(2) Right to stay where the only question is one of law.

(a) If the only question is one of law, which, if sent to the arbitrator, ought, under S. 10 (b), to be referred back by him to the Court, the Court will not stay hereunder until the question of law has been tried. *Re Carlisle*, 44 C.D. 200. Y

(b) Where a contract contains an agreement to refer disputes to arbitration, the Court will, as a rule, stay proceedings in an action on the contract, even though difficult questions of law are involved, provided such questions cannot be dealt with until the facts have been ascertained. The action may be allowed to proceed so far as regards matters which are outside the scope of the arbitration clause, and do not involve substantially the same facts and rights as fall to be determined by the arbitrator. *Rowe Brothers, Ltd. v. Cressley Brothers*, 57 Sol. Jo. 144. Z

(3) Misconduct of arbitrator.

It must be shown that the arbitrator chosen will probably be guilty of some misconduct in the matter of the arbitration, that he will not act fairly, otherwise the proceedings will not be stayed. *Ives v. Willans*, (1894) 2 Ch. 478. A

(4) Charge of unreasonable conduct against arbitrator.

Where works are constructed for a local authority under a contract which provides for a reference of disputes thereunder to an officer of the local authority, and the contractor sues the local authority on the contract, the Court will

8.—“*Sufficient reason why the matter should not be referred*”
—(Continued).

not order the action to be stayed on the submission to arbitration, where the contractor charges the arbitrator with unreasonable conduct with relation to the works, and it appears that there is a substantial dispute between the parties as to the conduct of the arbitrator. *Blackwell and Co., Ltd. v. Derby Corporation*, 75 J.P. 129; see, also, *Freeman and Sons v. Chester Rural District Council*, (1911) 1 K.B. 783=50 L.J. K.B. 695=104 L.T. 368=75 J.P. 132.

B

(5) Probable bias of arbitrator.

(a) The existence of any circumstance calculated to bias the mind of an arbitrator, unknown to either of the parties who have submitted to his decision, is a sufficient ground for the interference of a Court of Equity. *Kemp v. Rose*, 1 Giff. 258.

C

(b) In cases of contracts between a contractor and a company for the construction of works, although the engineer of the company is employed by the company to look after the contractor in the interest of the company, the contract frequently provides that any question or dispute, which may arise between the company and the contractor, under the contract, shall be referred to the engineer. And the Court will not release the contractor from this obligation unless the engineer has done something to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind. *Jackson v. Barry Rail Co.*, (1898) 1 Ch. 238; *Ives v. Willans*, (1894) 2 Ch. 478=68 L.J. Ch. 521; *Eckersley v. Mersey Docks*, (1894) 2 Q.B. 667. See *Wansbeck Rail Co. v. Trowdsdale*, L.R. 1 C.P. 269; *Nuttall v. Mayor of Manchester*, 9 Times L.R. 513; *Donskin and Leeds Canal, In re*, 9 Times L.R. 192; *Bright v. River Plate*, Russell, 9th Ed., p. 94.

D

(6) Arbitrator having direct pecuniary interest.

If there is an engagement entered into between the arbitrator and one of the parties, unknown to the other party, which gives the arbitrator a direct pecuniary interest in deciding against the party, who was ignorant of the engagement, the Court will not enforce a submission to arbitration. *Kimberley v. Dick*, L.R. 13 Eq. 1; *Kemp v. Rose*, 1 Giff. 258.

E

(7) Arbitrator, a debtor or creditor of a party.

The mere fact of owing a debt to or being a creditor of one of the parties is not such an interest as renders a person incompetent for the office of arbitrator. *Morgan v. Morgan*, 1 Dowl. 611=2 L.J. (N.S.) Ex. 56; *Drew v. Drew*, 2 Macq. 1.

F

(8) Arbitrator becoming interested after appointment.

Where an arbitrator, after his appointment, becomes interested in the subject-matter of the reference, he is not thereby disqualified, and the disqualification is not removed by his interest afterwards ceasing. *Edinburgh Magistrates v. Lowrie*, 5 F. 711.

G

(9) Interest known before signing submission.

(a) Objection as to interest only applies to the case of a concealed interest. *Russell*, 9th Ed., p. 93.

H

8.—“Sufficient reason why the matter should not be referred”
 —(Continued).

- (b) If the arbitrator have an interest in the subject of reference well known to the parties before they sign the submission, as if they refer to an owner of lands a question respecting the mode and expense of making a drain which will benefit the arbitrator's own estate, the award is good notwithstanding his interest. *Johnston v. Cheape*, 5 Dowl. 247; *Drew v. Drew*, 2 Macq. 1. I
- (10) **Active litigation between one party and arbitrator.**
 Active litigation between one of the parties to a submission to arbitration, and the arbitrator agreed on, is a ground upon which the Court will, and has jurisdiction to, interfere and revoke the submission, although the litigation arose at a period long subsequent to the date of the submission, and in respect of matters wholly unconnected with it. *Baring and Doulton, In re*, 61 L.J. Q.B. 704. J
- (11) **Arbitrator in employment of one party.**
 - (a) But where, by the terms of a building contract, all questions are submitted to the arbitration of an architect appointed by the building owners, the mere fact that the builders or those claiming through them bring an action against the architect charging him with fraud in relation to the contract does not entitle them to revoke the submission. *Belcher v. Roedean School, &c.*, 85 L.T. 468. K
 - (b) The Court distinguished this case from the case of *Baring and Doulton, In re*, 61 L.J.Q.B. 704, on the ground that, in the last-named case the proceedings were taken by the arbitrator, who had shown some warmth of feeling against the defendant. L
- (12) **Arbitrator, a servant of one of the parties.**
 - (a) In the case of an agreement to refer to a named arbitrator, even though he be a servant of one of the parties to the agreement, in order to disqualify the arbitrator from acting, it is necessary to show at least a probability that he will be biased in favour of one party. The mere fact that in a particular contract he will be required to arbitrate on questions involving his own professional skill is not enough to disqualify him. *Eckersley v. Mersey Docks and Harbour Board*, 2 Q.B. 667=9 R. 827=71 L.T. 203. M
 - (b) Where, after disputes had arisen under a policy, an insurance company appointed their manager as arbitrator, leave to revoke was given unless they substituted a disinterested arbitrator within a week. *Frankenberg and The Security Co., In re*, 10 Times L.R. 393. N
- (13) **Party himself as arbitrator.**
 A party cannot be a judge in his own cause, but if his opponent consent to his deciding the question between them, the Courts will not allow an objection afterwards, though he decide it in his own favour. *Matthew v. Oller-ton*, 4 Mod. 226; Comb. 218. O
- (14) **Land acquisition—Dispute between railway company and landowner—Company's valuer agreed as umpire.**
 Where a valuer frequently called in by a railway company to value land taken by them, was appointed umpire, to assess the value of neighbouring property, which they were about to take, and the land owner made no objection, though the position of the umpire was known to him, it was held that he could not set aside the award on the ground of the umpire's interest, though otherwise the objections might have been good. *Clout v. Metropolitan District Rail Co.*, 46 L.T. 141. P

8.—“*Sufficient reason why the matter should not be referred*”
—(Continued).

(14-a) Insolvency proceedings, sufficient ground to refuse to stay suit.

J entered into a written agreement for sale of certain sugar as guarantee broker of F. & Co. The agreement contained a clause by which the parties agreed to refer all matters in dispute between them to arbitration. J failed to sell certain consignments of sugar and became insolvent. F & Co. proved their claim for damages against J. before the Official Receiver. The amount of damages was subsequently reduced by the Judge. The Receiver then sued to recover from F & Co. the balance with interest of Rs. 25,000, the guarantee deposit. F & Co. wanted this suit to be referred to arbitration under the arbitration clause in the agreement.

Held, that the main question could now be litigated only with the leave of the Court, in view of S. 16 (2) of the Provincial Insolvency Act, and that insolvency proceedings would be sufficient reason why the matter should not be referred to arbitration in the discretion vested in Court by S. 19 of the Arbitration Act. 8 S.L.R. 60. Q

(15) Party refusing to appoint arbitrator.

See *Manchester Ship Canal Co. v. Pearson*, (1900) 2 Q.B. 606=69 L.J.Q.B. 852. R

(16) Arbitrator accepting hospitality of one of the parties.

The mere fact that the arbitrator prior to making his award has accepted the hospitality of one of the parties, although improper conduct in the circumstances, is not sufficient ground for setting aside the award on the ground of misconduct, in the absence of evidence of corrupt intention on the part of the party, or of the arbitrator having been influenced thereby. *Re Hopper*, L.R. 2 Q.B. p. 374. S

(17) Delivery of cross claim.

- (a) Where an action was brought on a claim for the hire of a ship, to which there was admittedly no answer, but a cross-claim was set up for damages arising out of the contract of hire, the Court stayed the action and enforced a reference to arbitration in accordance with the terms of the contract. *Russell v. Polegrini*, 6 E. & B. 1020=26 L.J.Q.B. 75; *Seligman v. Le Boutillier*, L.R. 1 C.P. 681. T
- (b) But, in the like circumstances, where the action was brought, not against the freighter, but only against a surety for the payment of the freight, the Court refused a reference. *Dawit v. Lazard*, 27 L.J. Ex. 393. U

(18) Where fraud is charged.

- (a) In a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. *Russell v. Russell*, 49 L.J. Ch. 265=14 Ch. D. 471=42 L.T. 112. V
- (b) But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *prima facie* case of fraud is proved. (*Ibid.*) *Minifie v. Railway Passengers' Assurance Society*, 44 L.T. 552; *Wallis v. Hiroh*, 1 C.B.N.S. 816=26 L.J.C.P. 72; *Russell v. Harris*, 65 L.T. 752; *Alexander v. Mendl*, 22 L.T. 609. *Russell*, 9th Ed., p. 50. W

S.—“Sufficient reason why the matter should not be referred”

—(Continued).

- (c) In cases such as often occur in claims under policies of fire insurance, where there is no liability until after arbitration, the Court will not refuse to stay the action because a charge of fraud is made against the plaintiff. *Trainor v. Phoenix Fire Assurance Co.*, 65 L.T. 825. X
- (d) Where a policy of fire insurance provided that, “whenever any difference or differences shall arise between the insured or any claimant under this policy and the company as to any claim for any loss or damage, or as to any matter touching the rights, duties and liabilities of the insured or the company, in any way relating to or arising out of this policy, such difference or differences shall be referred to the decision of an arbitrator.” The Court of Appeal held that, until the arbitration had taken place, and the liability of the company had been ascertained by the award of the arbitrator, no action could be brought. *Davies v. Alliance Assurance Co.*, 7th March 1904 (unreported). Russell, 9th Ed., 50. Y
- (e) In this case, the defence set up was that the claimant had fraudulently over insured the articles destroyed by the fire, and it was contended on behalf of the claimant that this fraud, if proved, would vitiate the policy *ab initio*, and that the clause as to arbitration did not apply. Nevertheless the Court held that, until the matter had been referred to arbitration, there was no right of action at all, and consequently they stayed the action. (*Ibid.*). Z

(19) **Agreement not to raise charge of fraud.**

It is competent for the parties to agree that the question of fraud on the part of the arbitrator shall not be raised by either of them. An agreement that the award of an architect shall not be impeached “for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy,” is valid in the absence of fraud of either party, and is not void as being against public policy. *Tullis v. Jacson*, (1892) 3 Ch. 441=61 L.J. Ch. 655. A

(20) **Agreement to refer to foreign tribunal.**

An agreement to refer disputes to a foreign tribunal entitles a defendant to a stay of proceedings in an action brought against him to enforce the agreement, unless the plaintiff can make out a case for an injunction. *Kirchner v. Gruban*, 78 L.J. Ch. 117=1 Ch. 413=99 L.T. 932. B

(21) **Action for wrongful dismissal from service.**

(a) By a written agreement the plaintiff undertook to manage a brewery of the defendant for five years; and there was a provision that any dispute should be referred to arbitration. Before the time expired the defendant dismissed the plaintiff for misconduct. The plaintiff having brought an action for wrongful dismissal: Held, a proper case for staying proceedings. *Wickham v. Hardy*, 28 L.J. Ex. 215=5 Jur. 871. See also *Renshaw v. Queen Anne Mansions Co.*, (1897) 1 Q.B. 662=65 L.J. Q.B. 496. C

(b) A contract for the employment of the plaintiff, by the defendants as their agent provided that “any dispute arising in connection with” the contract should be referred to arbitration pursuant to certain bye-laws, which provided that “all disputes arising out of transactions connected with the trade” should be referred to arbitrators, and that neither contracting party should bring any action against the other in respect of any dispute until

8.—“*Sufficient reason why the matter should not be referred*”
—(Continued).

the dispute had been settled by the arbitrators. Disputes as to the plaintiff's conduct as agent were subsequently referred to arbitrators, who made an award adverse to the plaintiff, whereupon the defendants dismissed him. The plaintiff then brought an action against the defendants for wrongful dismissal, and it was held that the dispute in the action was within the arbitration clauses in the contract and bye-laws, and that the action should be stayed. *Parry v. Liverpool Matt. Co.*, (1900) 1 Q.B. 389. D

- (c) In an action for wrongful dismissal on a contract to pay salary, and also to give a share of the profits during a certain time, the contract contained a clause for reference to arbitration of disputes relating to the construction of the deed, or as to the accounts. The contest being as to the right to dismiss for neglect of duty: *Held*, that the action was not referable. *Smith v. Allan*, 3 F. & F. 156. H

(22) Dispute between partners.

- (a) Where partnership articles provide for arbitration as to disputes between the partners, the Court will stay an action and, if necessary, appoint a receiver pending the winding up of the partnership. This may be done by one order. *Compagnie du Senegal v. Woods*, 58 L.J. Ch. 166; *Pini v. Roncoroni*, (1892) 1 Ch. 688=61 L.J. Ch. 218. F

- (b) Under articles of partnership it was provided that the partnership was to continue for twenty-one years, and that if any difference arose between the parties in regard to the construction of any of the articles, or to any division, act, or thing to be done in pursuance thereof, or to any other matter or thing relating to the said partnership or the affairs thereof, such difference should be referred to arbitration. One of the partners brought an action before the expiration of the term of twenty-one years for the dissolution of partnership, on the ground that it could not be carried on at a profit. The other partner denied that the business could not be carried on at a profit, and moved that the proceedings should be stayed: *Held*, that the question whether the partnership should be dissolved or not was not a question which could be referred to arbitration under the arbitration clause. *Turnell v. Sanderson*, 60 L.J. Ch. 703=64 L.T. 654. G

(23) Action for dissolution of partnership.

- (a) An action for the dissolution of a partnership may be stayed where there is a clause in the partnership articles for the reference of any difference to arbitration. *Vawdrey v. Simpson*, 1 Ch. 166=65 L.J. Ch. 369. H

- (b) A partnership deed contained a clause providing for arbitration in the case of any difference arising at any time between the partners or “between one or more of them and the executors or administrators of the others or other of them or between their respective executors.” The partnership having been dissolved as regards one partner who had previously mortgaged his share and interest in the partnership, the mortgagees of that partner's share brought an action for an account of his share against all the partners. The continuing partners and the outgoing partner had respectively

8.—“Sufficient reason why the matter should not be referred”
 —(Continued).

appointed their accountants as arbitrators in accordance with the arbitration clause. On a motion by the continuing partners to stay proceedings in the action under this section.

Held—that the mortgagees had under S. 31 of the Partnership Act, 1890, a statutory right, independent of the partnership deed, to an account of the partner's share from the date of dissolution; that the arbitration clause in the partnership deed, which did not in terms provide for persons claiming through or under the partners, was not binding on the mortgagees; that the mortgagees were not parties to the arbitration and would not be bound by any account taken in it; and therefore that the action ought not to be stayed.

Held also—that the Court having a discretion under this section may refuse to stay proceedings where the principal points in dispute are matters of law and where the arbitrators appointed are mere advocates of the parties and it is not probable that they would exercise an independent judgment on the matters in question. *Bonvian v. Neame*, (1910) 1 Ch. 782=79 L.J. Ch. 388=102 L.T. 708. I

(24) Provision to determine partnership by notice—Court better tribunal.

Partnership articles provided that, if any partner should be guilty of certain misconduct, the other partners might by notice in writing determine the partnership, and that the question whether a case had happened to authorise the exercise of this power should be referred to arbitration. One of the partners was served by the rest with a notice purporting to determine the partnership under this power. Upon an action being brought by the partner so served to restrain his partners from acting upon the notice, the defendants moved to stay the action and to refer the matter to arbitration as provided by the articles. Romer, J., refused to stay the action on the ground that the question whether the notice was good or bad was more fit for decision by the Court than by an arbitrator. *Barnes v. Youngs*, (1898) 1 Ch. 414=67 L.J. Ch. 263. J

(25) Application by one partner for appointment of receiver.

Where the partners agreed that “all disputes arising during or in the winding-up of the partnership should be referred,” and one of the partners brought an action for appointment of a receiver, the action was stayed. *Denton v. Legge*, 72 L.T. 626. K

(26) Expired partnership deed—Suit to take accounts.

A partnership deed containing the usual arbitration clause provided for a partnership for one year only. But the partnership, by verbal arrangement, was continued for several years, after which it was dissolved, and disputes arose as to the settlement of the partnership accounts. It was held that the arbitration clause was in force, and a suit to take the accounts was stayed. *Gillett v. Thornton*, L.R. 19 Eq. 599=44 L.J. Ch. 398. See, also, *Cope v. Cope*, 52 L.T. 607. L

(27) Several disputes, one only referable.

Where one only of the matters in dispute in respect of which an action had been brought was capable of being referred under the arbitration clause, Fry J., refused to stay the action. *Young v. Buckett*, 51 L.J.Ch. 504; see, also, *Wheatley v. Westminster Brymbo, &c., Co.*, 2 Dr. & Sm. 847; *Patteson v. Northern Accident Insurance Co.*, (1901) 2 I.R. 262. M

8.—“*Sufficient reason why the matter should not be referred*”
—(Continued).

(28) Dispute between Provident society and member.

On an application by motion to stay proceedings in an action on the ground that the matters in dispute had been agreed to be referred to arbitration, by reason of S. 49 of the Industrial and Provident Societies Act, 1893, and of the rules of the Society, *held*—that it was no answer for the application to say that the matter in dispute was whether certain acts were *ultra vires* of the society or not, and that proceedings must be stayed accordingly. *Cox v. Hutchinson*, (1910) 1 Ch. 518=79 L.J. Ch. 259=102 L.T. 213. N

(29) Agreement to refer impeached.

Where the agreement to refer matters is itself impeached in a pending suit, the Court may issue an injunction to stay the arbitration proceedings. 4 S.L.R. 187. O

(30) Lease containing arbitration clause—Action by lessors claiming rectification of lease—Application by lessees for stay.

By a deed the plaintiff company leased its undertaking business and goodwill to the M. company(defendant) for a term, subject to certain powers of determination and renewal. The deed contained a proviso giving an option to the defendant of purchasing the undertaking of the plaintiff company. The deed also contained an arbitration clause providing that “any dispute, difference, or question touching the construction, meaning, or effect of these presents, or any clause or thing herein contained or the rights or liabilities of the said parties respectively, should be referred to arbitration.” Questions having arisen with reference to the option to purchase given by the deed, the plaintiff company brought an action claiming (1) a declaration that the option was void and of no effect; (2) if the option was not void, a declaration that, in ascertaining the price to be paid for the demised premises on the purchase thereof under the option, the value of a certain obligation should be taken on a particular footing; (3) as an alternative to (2), rectification of the lease. On a motion by the defendant company under this section that the proceedings in the action might be stayed in order that the questions raised therein might be referred to arbitration: *Held*—that the question as to rectification of the lease was not one which fell within the arbitration clause. *Held*, also—that the questions as to the construction of the option to purchase and rectification were so intimately connected that they should be dealt with together by the Court.

Held, therefore—that the application to stay the proceedings must be refused. *Printing Machinery Co., Ltd. v. Linotype & Machinery, Ltd.*, (1912) 1 Ch. 566=81 L.J. Ch. 422=106 L.T. 743=28 T.L.R. 224=56 Sol. Jo. 271. P

(31) Arbitrator's power to award ejection.

It is no reason for refusing to stay proceedings that the causes of action arise out of one deed and the arbitration clause is contained in another, if the two deeds form one contract, nor that the action is for ejection for breach of covenants, and that the arbitrators cannot award an ejection; for the Court, if the award warrants it, may make an order equivalent to a judgment for ejection at common law. *Wade-Gery v. Morrison*, 37 L.T. 271. See *Turnock v. Sartoris*, 43 Ch. D. 150. Q

8.—“*Sufficient reason why the matter should not be referred*”
—(Concluded).

(32) Waiver of objection.

An objection to an arbitrator which might otherwise have been valid may be waived by the conduct of the parties. *Elliott v. South Devon Rail. Co.*, 2 De. Gex. & S. 17. R

9.—“*Ready and willing....arbitration.*”

Party applying for stay should be ready to do all things necessary to proper conduct of arbitration.

(a) Unless the party claiming to stay the proceedings is ready and willing to do all things necessary to the proper conduct of the arbitration, the Court will decline to grant a stay. *Davis v. Starr*, 41 Ch. D. 242=58 L.J. Ch. 808. S

(b) In this case, the Court took a wrong view of the facts, although the principle on which it proceeded was right; see *Parry v. Liverpool Matt Co.*, (1900) 1 Q.B. 339, per Lidley, M.R., at p. 342. T

(c) There ought to be an affidavit of the applicant's readiness and willingness to refer, and the Court must be satisfied that the matter in question is one which the party proposing the reference has agreed to refer to arbitration. *Piercy v. Young*, 14 Ch. D. 200. U

10.—“*May make an order staying proceedings.*”

(1) Discretion of Court to stay legal proceedings.

Under this section the Court has a discretion as to staying legal proceedings commenced by one party to a submission to arbitration against the other party. *Carlisle, In re, Clegg v. Clegg*, 59 L.J. Ch. 520=44 Ch. D. 200=62 L.T. 821. V

(2) Court bound to exercise its discretion.

The Court has a discretion hereunder, which it is bound to exercise. *Re Carlisle*, 44 C.D. 200; *Lyon v. Johnson*, 40 C.D. 579; *Wallis v. Hirsch*, 1 C.B. N.S. 316; *Aanson v. Haddan*, 6 C.B. N.S. 584; *Young v. Buckett*, 30 W.R. 511. W

(3) Appointment of receiver.

The Court has jurisdiction to appoint a receiver, and can, by the same order, with a view to reference to arbitration, stay all proceedings in the action except for the purpose of carrying out the order for a receiver. *Pini v. Bancoroni*, 61 L.J. Ch. 218=1 Ch. 693=66 L.T. 255=40 W.R. 297. X

(4) Revision of an order under this section.

An order on an application under this section, staying or refusing to stay proceedings, is not a decree within the terms of S. 2 of the Code of Civil Procedure and is therefore not open to revision by the Chief Court under S. 70 (1) (b) of the Punjab Courts Act, 1884. Y

Power for High Court to make rules. 20. The High Court may make rules consistent with this Act 1 as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto;

- (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;
- (c) the transfer to Presidency Courts of Small Causes for execution of awards filed, where the sum awarded does not exceed two thousand rupees;
- (d) the staying of any suit or proceeding in contravention of a submission to arbitration; and
- (e) generally, all proceedings in Court under this Act.

(NOTES).

I.—“Consistent with this Act.”

Rules not in accordance with the Act are inoperative.

The Rules framed by the High Court under the Act, in so far as they are not in accordance with the Act, cannot be followed in preference to the provisions of the Act. #0 C. 219=17 C.W.N. 395=18 Ind. Cas. 978. Z

21. In section 21 of the Specific Relief Act, 1877, after the words "Code of Civil Procedure" the words and figures Amendment of "and the Indian Arbitration Act, 1899," shall be inserted, and for the words "a controversy" the words section 21, Act I, 1877. "present or future differences" shall be substituted.

Crown to be bound. 22. The provisions of this Act shall be binding on the Crown.

(NOTES).

Corresponding English Law.

This section corresponds to S. 23 of the English Arbitration Act, 1889, 52 and 53 Vic., c. 49. A

23. (1) This Act shall apply within the local limits of the ordinary jurisdiction of the Chief Court of Lower Burma in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted within those local limits.
Special provision as to application of Act to Rangoon.

(2) For the purposes of this Act, the local limits aforesaid shall be deemed to be a Presidency-Town.

(NOTES).

Legislative Changes.

This section was substituted by Act VI of 1900 (Lower Burma Courts), S. 47 and Sch. I. B

THE FIRST SCHEDULE.

(See section 6).

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

I. If no other mode of reference is provided, the reference shall be to a single arbitrator.¹

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (a) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. C

I.—“Reference shall be to a single arbitrator.”

Agreement to refer to one arbitrator—Name of another also inserted in the document—Acquiescence.

Where the agreement between the parties was that the matter in difference between them should be referred to the arbitration of one person only, and one of the parties inserted in the instrument the name of a second gentleman, the other party, if without any objection, submitted to the arbitration of both the gentlemen, cannot repudiate the position he deliberately took before the arbitrators. 15 C.L.J. 860=18 Ind. Cas. 161. See, also, 10 M.I.A. 413. D

II. If the reference is to two arbitrators, the two arbitrators may appoint an umpire¹ at any time within the period during which they have power to make an award.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (b) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vict. c. 49. E

I.—“The two arbitrators may appoint an umpire.”

Appointment of umpire to be signed by arbitrators together.

(a) The appointment of an umpire, when in writing, should generally be signed by both arbitrators together. When one signs an appointment alone and then sends the document for signature to the other, it is invalid, and the award of the umpire will be a nullity. *Lord v. Lord*, 5 E. & B. 404=26 L.J.Q.B. 34. F

(b) Unless, indeed, the two arbitrators have met and agreed on the person to be umpire, and the signing is the mere record of their previous judicial decision. *Hopper, In re*, L.R. 2 Q.B. 367=36 L.J.Q.B. 97. G

III. The arbitrators shall make their award¹ in writing within three months² after entering on the reference³, or after having been called on to act⁴ by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (c) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. H

1.—“*Shall make their award.*”

(1) Arbitrator cannot be compelled to make award.

- (a) Though the arbitrator has taken on himself the burthen of the reference, and held several meetings, but not closed the case, he might decline to go on any further with the arbitration, and the Courts have no jurisdiction over him to compel him to proceed. *Lewin v. Holbrook*, 11 M. & W. 110=12 L.J. Ex. 287; *Crawshay v. Collins*, 1 Swanst. 40; *Cooth v. Jackson*, 6 Ves. 11; *Darbey v. Whitaker*, 4 Drew. 184. *Russell*, 9th Ed., p. 158. I
(b) Courts cannot order an arbitrator to make his award according to a particular principle. *Houghton v. Bankart*, 3 DeG.F. & J. 16. J

(2) Award prepared by legal adviser.

A recital in an award, that it had been drawn by a person who, under the terms of the submission, attended the arbitrator as an attorney, does not constitute any improper delegation of authority. *Baker v. Cotterill*, 7 D. & L. 20=18 L.J.Q.B. 345=14 Jur. 1120. K

(3) Power to make several awards.

Sometimes the submission directs or empowers the arbitrator to make one or more awards. Under such a special provision his authority will of course not necessarily be terminated by making one award, though final as to part. It is not till he has made what he intends as a last and final award within the meaning of the submission, that his power can be considered as exhausted. *Dowse v. Coote*, 8 Bing. 20=8 L.J. (O.S.) C.P. 127; *Stephens v. Lowe*, 9 Bing. 92=1 L.J. (N.S.) C.P. 150; *Wrightson v. Bywater*, 8 M. & W. 199. L

2.—“*Within three months.*”

‘Within three months’, meaning.

The three months after “entering on the reference, or ‘after being called on to act,’ commence to run from the time of performing or being called upon to perform any necessary preliminary or specific act connected with the arbitration, such, for example, as appointing an umpire. *Re Baring Gould and Sharpeyton Pick, &c., Syndicate*, (1829) 2 Ch. 80. M

3.—“*After entering on the reference.*”

(1) ‘Entering on the reference,’ meaning.

An arbitrator enters on a reference, not when he accepts the office, or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he enters into the matter of the reference, either with both parties before him, or under peremptory appointment enabling him to proceed *ex parte*. *Baker v. Stephens*, 8 B. & S. 488=36 L.J. Q.B. 286=L.R. 2 Q.B. 528=15 W.R. 902. N

(2) Authority of arbitrator when commences.

Where the submission prescribes no time for the reference to begin, the authority of the arbitrator commences from the time of the agreement to refer being entered into, and he may make his award on the same day on which the submission is executed. *Anon.*, Latch. 14. O

(3) Deed of submission not executed by some parties—Authority of arbitrator when commences.

But when there are several parties to a deed of submission, and the consideration to each to execute it is the accession of all the parties to the reference, the

3.—“*After entering on the reference*”—(Concluded).

authority of the arbitrator does not commence until all have executed it; and even though the submission be several as well as joint, he has no power to decide on a separate matter in difference between two of those who have signed it, when there are others who have not executed it.
Antram v. Chace, 15 East 209.

P

(4) Fulfilment of a condition precedent.

The jurisdiction of a referee on a boat-race does not attach unless the conditions prescribed on which the start is to take place have been fulfilled. *Sadler v. Smith*, L.R. 5 Q.B. 40=89 L.J. Q. B. 17.

Q

(5) Authority of arbitrator, when determines.

As soon as the award is made, the authority of the arbitrator, having once been completely exercised according to the terms of the reference, is at an end. He is not at liberty, after executing the award, to exercise a fresh judgment on the case, or generally to alter the award in any particular. If he does so in fact, the alteration will be merely nugatory, and the award, as originally written, will stand good; his act will be like a mere spoliation by a stranger. *Brooke v. Mitchell*, 6 M. & W. 473=9 L.J. (N.S.) Ex. 269; *Henfree v. Bromley*, 6 East 309; *Trew v. Burton*, 1 C. & M. 583=2 L.J. (N.S.) Ex. 236. *Russell*, 9th Ed., p. 114.

R

(6) Authority of arbitrator expires by summoning umpire.

When an umpire has once been summoned, the jurisdiction of the arbitrators is gone; and the Court, in referring back the award, will send it to the umpire, and not to the arbitrators. *Westminster and Brymbo Coal and Coke Co. v. Clayton*, 13 W.R. 184=11 L.T. 366.

S

(7) Arbitrator *functus officio* after execution of award.

When an arbitrator has executed an instrument as and for his award, he is *functus officio*, and cannot of his own authority remedy any mistake that he may have made in executing it. *Mordus v. Palmer*, 40 L.J. Ch. 8=L.R. 6 Ch. 22=23 L.T. 752=19 W.R. 86.

T

(8) Award set aside—No renewal of authority.

Setting the award aside as void does not renew his authority, so as to enable him to make a fresh award. The authority once executed, though ineffectually, is gone for ever. *Russell*, 9th Ed., p. 115.

U

4.—“*Called on to act.*”

'Called on to act,' meaning.

The words “called on to act” in this clause mean called on to do some specific thing connected with the arbitration; therefore a notice to appoint an umpire is a notice which calls upon the arbitrators to act within the meaning of this clause. *Baring-Gould v. Sharpington, &c., Syndicete*, (1899) 2 Ch. 80=68 L.J. Ch. 429.

V

IV. If the arbitrators have allowed their time or extended time to expire¹ without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (d) of the First Schedule to the English Arbitration Act, 1899, 52 and 53 Vict., c. 49. W

I.—“Allowed their time....to expire.”

- (1) Award not made within specified time—Subsequently contesting case before arbitrator under protest.

If an arbitrator, who has suffered his time to expire, determines to proceed in the reference, notwithstanding an objection taken on that ground by a party to the reference, and the party protests that any award which the arbitrator may make will be therefore void, his continuing to attend and contest the case before the arbitrator, under such protest, does not give the arbitrator authority to make an award. *Ringland v. Lowndes*, 17 C.B. 514=33 L.J.C.P. 337=10 Jur. 850=12 W.R. 1010; *Davies v. Price*, 84 L.J. Q.B. 8=11 L.T. 208=12 W.R. 1009. X

- (2) Waiver of objections to making award after specified time.

A waiver must be an intentional act with knowledge. Where, therefore, there is an agreement to refer to arbitration, and it is agreed that the award shall be made within a specified time, and the award is not made until after the expiration of such time, and one of the parties, in ignorance of that fact, takes it up and pays the charges for it, his doing so will not amount to a waiver of the condition as to time specified in the agreement. *Darnley v. L.C. and D. Ry.*, 86 L.J. Ch. 404=L.R. 2 H.L. 48=16 L.T. 217=15 W.R. 817. Y

- (3) Award sought to be filed rejected as made out of time and inoperative—Order, if legal.

The order of the Trial Judge refusing the application of one of the parties to file the award in Court, on the ground that it was made out of time and against a firm the names of the members whereof were not ascertained, and so was inoperative, was set aside by the Court of Appeal, and the award was directed to be filed with liberty to the opposite party to file objections. 17 C.W.N. 295=40 C. 219=18 Ind. Cas. 978. Z

V. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, by any writing signed by him, may, from time to time, enlarge the time for making his award.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (e) of the First Schedule to the English Arbitration Act, 1899, 52 and 53 Vict., c. 49. A

VI. The parties to the reference, and all persons claiming through them respectively, shall, subject to the provisions of any law for the time being in force, submit to be examined ¹ by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall, subject

as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(NOTES).

Corresponding English Law.

This rule follows in great measure rule (f) of the First Schedule to the English Arbitration Act, 1896, 52 and 53 Vict., c. 49. B

I.—“Submit to be examined.”

(1) Quantity of evidence to be heard—Discretion of arbitrator.

The arbitrator should generally hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury. But he may exercise some discretion as to the quantity of evidence he will hear. *Nickalls v. Warren*, 6 Q.B. 615, *per* Lord Denman, C.J., 618=14 L.J.Q.B. 75. C

(2) Evidence to be heard in presence of both parties.

(a) The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken; and an arbitrator entirely misconceives his duty who takes upon himself to hear evidence behind the back of the party interested in controverting it. *Drew v. Drew*, 2 Macq. 1. D

(b) No Court should permit an arbitrator to decide so delicate a matter as whether a witness examined in the absence of one of the parties had an influence on him or not. *Walker v. Probiner*, 6 Ves. 70; *Petherstone v. Cooper*, 9 Ves. 67. E

(3) Action for non-repair of a house—Award on a view of the premises.

(a) If an arbitrator, to whom an action for not repairing a house has been referred, make his award on a view of the premises without calling the parties before him, the Court will set aside the award; for, though the premises may almost tell their own tale, yet there may be other facts which ought to be inquired into, such as payments by the party, or excuses for not repairing. *Anon*, 2 Chitt. Rep. 44. F

(b) Still less can an award stand where the arbitrator hears one side only. *Bradnick v. Thompson*, 8 East 344; *Philippe v. Ingram*, 8 Dowl. 669. G

(4) Arbitrator should not receive private communication from a party.

An arbitrator can hardly be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to, and capable of being met and resisted by, the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side. *Russell*, 9th Ed., p. 147. H

I.—“Submit to be examined”—(Concluded).

(5) Arbitrator's refusal to receive evidence.

(a) Declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award. *Johnstone v. Cheape*, 5 Dow. 247. I-S

(b) Even when the refusal to hear one side is not wilful, the award will be bad. *Sharpe v. Bickeridge*, 3 Dow. 102. T

(6) Arbitrator when justified in refusing to receive evidence.

When the submission recited that the arbitrator had been appointed on account of his skill and knowledge of the subject, and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support it by proof, the arbitrator is justified in refusing to receive it, if, taking all the matters alleged to be facts into consideration, yet having his own local knowledge to guide him, and all the circumstances in his view, he felt that such facts would have no effect upon his determination. *Johnstone v. Cheape*, 5 Dow. 247. U

(7) Evidence taken outside jurisdiction.

Arbitrators may have to take evidence outside the jurisdiction of the subject which they have to decide, but if their award is within their jurisdiction, the mere fact of their taking such evidence would not necessarily invalidate their award, or make their proceedings improper. 4 S.L.R. 196. V

(8) Award on inspection of samples.

An arbitrator experienced in cloth was held justified in deciding upon inspection of samples only. *Wright v. Howson*, 4 Times L.R. 886. W

(9) Umpire refusing to hear party.

While the matters were still open, and one party asked to be heard and the umpire refused and made his award, it was set aside. *Mauder, In re*, 49 L.T. 535. X

(10) Duty to tender evidence.

In order to make out a case entitling the party to impeach the award, the witnesses must be distinctly tendered to the arbitrator for hearing. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence. *Graven v. Graven*, 7 Taunt. 644; *Grassbrook v. Davis*, 5 B. & C. 532. Y

(11) Refusal of arbitrator to wait for absent witness.

Where an arbitrator refused to wait for the return of an alleged material witness, absent on a voyage to China, and made his award, the Court declined to interfere with the exercise of his discretion. *Ginder v. Curtis*, 14 O.B.N.S. 728. Z

(12) Evidence should be taken only on questions within the scope of the reference.

The arbitrators ought to form a clear and definite opinion as to what questions are referred to their arbitration and decide what is within the scope of the reference and what is outside it. If this is once definitely settled, there would be no difficulty in their deciding the question of admissibility of any evidence that may be tendered by one or other of the parties. 10 Bom. L.R. 351 (852). A

(13) Discretion of arbitrator to re-open case.

When the case is closed, it is in the discretion of the arbitrator whether he will re-open it and receive further evidence. *Ringer v. Joyce*, 1 Marsh. 404. B

VII. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath ¹.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (g) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. G

I.—“ Shall....be examined on oath.”

(1) **Witness not sworn—Acquiescence.**

(a) By not persisting at the time of examination in requiring that the witness should be sworn, a party will be taken to have assented to the omission of the oath. *Ridout v. Pye*, 1 B. & P. 91; *Biggs v. Hansell*, 16 C.B. 562. C-1

(b) Even where the defendant objected that a witness tendered by the plaintiff could not be examined, as he had not been sworn before a judge, but, the objection being overruled by the arbitrator, afterwards called witnesses in answer who gave their testimony unsworn, he was taken not only to have waived any right to object, but to have acquiesced in the course pursued. *Allen v. Francis*, 9 Jur. 691=4 D. & L. 607, n. See *Smith v. Sparrow*, 16 L.J.Q.B. 189=4 D. & L. 604. D

(2) **Discretion to examine on oath.**

If the submission run that the arbitrator “shall be at liberty, if he shall think fit, to examine the parties and their respective witnesses on oath,” it is left to the option of the arbitrator whether he will examine them on oath or not, although one of the parties require the witnesses to be sworn. *Smith v. Goff*, 14 M. & W. 264. E

VIII. The award to be made by the arbitrators or umpire shall be final and binding¹ on the parties and the persons claiming under them ² respectively.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (h) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vict., c. 49. F

I.—“ Shall be final and binding.”

(1) **Award must be a final decision of all matters submitted.**

(a) The arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. *Whitworth v. Hulse*, L.R. 1 Ex. 251; *Randall v. Randall*, 7 East, 81; *Samuel v. Cooper*, 2 A. & C. 752. See *Wright and Cromford Canal Co. In re*, 1 Q.B. 98. Russell, 9th Ed., 195. G

(b) His failure to determine any of them may completely vitiate his award; this would specially be the result where there is such a connection and inter-dependence between the various matters covered by the submission that the decision and disposition of some of them only, to the exclusion of others, would operate to produce injustice between the parties. But this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. An award is none the less final, though it does not execute itself or preclude all future controversies; if it leaves nothing to be done but the performance of some

1.—“*Shall be final and binding*”—(Continued).

ministerial act, it is not faulty for want of such finality and certainty; the principle applicable is *certum est quod certum reddi potest*. (That is sufficiently certain which can be made certain). 14 C.L.J. 188. H

- (c) The obligation so to decide on all matters depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him. The position is different where the arbitrator is empowered to make one or more awards at his discretion. 13 C.L.J. 399. I

(2) Award reserving or delegating judicial authority.

- (a) An arbitrator cannot in his award reserve either to himself, or delegate to another, the power of performing in future any act of a judicial nature respecting the matter submitted. *Winch v. Sanders*, 2 Rolls, Rep. 214= Cro. Jac. 584; *Selby v. Russell*, 13 Mod. 139. J

- (b) His duty is to make a final and complete determination respecting them by his award, and it is a breach of that duty to leave anything to be determined hereafter. *Russell*, 9th Ed., p. 201. K

(3) Reservation or delegation of ministerial act.

Though the arbitrator cannot reserve a further *judicial* act to be done, he may reserve a further *ministerial* act to be done either by himself or a stranger, at any time, even after the time limited for making the award has expired. *Thorp v. Cole*, 2 C.M. & R. 367. L

(4-5) Reservation to arbitrator—Construction.

A reservation to the arbitrator is generally construed to be judicial. Thus it has been held, that if the arbitrators award that the defendant shall pay the plaintiff a sum certain, and in security for the payment shall execute such a bond as they shall advise, the award is invalid. *Russell*, 9th Ed., 203. M

(6) Reservation to stranger—Construction.

So also a direction to execute such bond by way of security for the sum awarded, or such releases as a stranger shall advise, has been considered equally bad. (*Ibid.*). N

(7) Reservation to appoint Counsel to settle deeds.

On a reference respecting the right to a certain house and premises, the award, which directed certain parties to execute to another party all such conveyances, releases, and assurances, as might be necessary to pass their respective interests to him, was held void *in toto*; because it reserved to the arbitrator a power to appoint a counsel or solicitor to settle the proper deeds. *Tandy v. Tandy*, 9 Dowl. 1044. O

(8-9) Award not deciding all matters referred.

An award which leaves some of the questions undecided, or leaves it in doubt whether some of the questions have been decided, cannot be maintained. *Wakefield v. Llansily Ry. and Dock Co.*, 11 Jur. 456=12 L.T. 509=18 W.R. 828. P

(10) Point for decision to be stated and brought to the notice of arbitrator.

- (a) In order to invalidate an award for not deciding a particular question, it must be established that the point was specifically stated and brought to the notice of the arbitrators. 15 C.L.J. 360; see, also, *Rees v. Waters*, 16 M. & W. 263. Q

I.—“ Shall be final and binding ”—(Continued).

- (b) An award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference or the parties showed by their conduct that they did not mean him to decide it. 14 C.L.J. 188. R
- (11) No decision as to matter not brought to arbitrator's notice.
 No objection can be made to the award if the arbitrator determine all questions brought before his notice, though there are other matters within scope of the submission to which his attention has not been drawn. *Middleton v. Weeks*, Cro. Jac. 200; *Elsom v. Rolfe*, 2 Smith 459. S
- (12) All disputes not specifically but substantially dealt with by award.
 (a) Where an arbitrator, to whom all matters in difference in a cause are referred, professes by his award to deal with the whole matters, it is no objection that he omits specifically to dispose of one of the matters in difference, if it necessarily appears from the whole of the award that that matter was substantially disposed of. *Biggs v. Hansell*, 16 C.B. 562. T
- (b) An award need not in terms profess to be made “of and concerning the premises,” or formally express that the arbitrator adjudicates on every matter in difference, if it appear on the face of the instrument that it is an award on all the matters submitted. *Brown and Croydon Canal Co. In re*, 9 A. & E. 522=8 L.J. (N.S.) Q.B. 92. U
- (13) Award should specifically find all issues.
 (a) Where a cause in which there are several issues is referred, and the costs of the cause are to abide the event of the award, the arbitrator must award specifically on each issue; and an award that the plaintiff had good cause of action against the defendant, and that the defendant should pay to the plaintiff a certain sum, together with the costs of the action and of the reference, is bad. *Bourke v. Lloyd*, 10 M. & W. 550=2 D. 452=12 L.J. Ex. 4. V
- (b) Where the whole case has been submitted to the arbitration of a person, his duty is to decide the whole dispute substantially, he is not bound to write a judgment and give his finding on each issue although he sets forth in the award all the issues *seriatim*. 14 Ind. Cas. 371. W
- (14) Incomplete award cannot be sustained.
 Where the award leaves undecided one of the cardinal points in the controversy, the award is incomplete and cannot be sustained. 13 C.L.J. 399. X
- (15) Omission to decide all matters—Effect.
 An omission to decide all the matters referred to an arbitrator amounts to a mistake on his part and does not render the award a nullity. 5 S.L.R. 240. Y
- (16) Partnership disputed—No decision as to partnership.
 It being disputed whether A had been in partnership with B, and if so, whether and when it had been put an end to, an award that if a partnership ever existed it was terminated by consent on a certain day is not final. *Bhear v. Harradine*, 7 Ex. 269=21 L.J. Ex. 127. Z
- (17) Award to release all actions except certain bonds.
 But an award that one should release to the other all actions and debts except bonds made for the performance of former awards, was held a good award, as amounting to an award that the bonds should stand in full force, and not as excepting them from decision. *Sallots v. Girling*, Cro. Jac. 277. A

t.—“ Shall be final and binding ”—(Continued).

(18) Award that all suits and actions should cease.

So an award that all suits and actions should cease, and that all matters should be determined except that concerning a certain bond, which was to stand in full force, was held a sufficient determination concerning all the controversies, and no disclaimer to meddle with any. *Berry v. Penning*, Cro. Jac. 399. B

(19) Arbitrator omitting to give directions.

If the arbitrator omit to give the necessary directions to effectuate the objects for which he is appointed, the award is not final. *Johnson v. Wilson*, Willes, 248. C

(20) Award failing to decide a point as being one of no substantial merits.

An award cannot be sustained where the arbitrators failed to decide a point submitted to them on the ground that they thought that it had no substantial merits. (1912) M.W.N. 1076. D

(21) Power of Court to uphold such award.

A Court, which upheld such an award, justifying the same for the reason that in its opinion also the point has no merits, acts without jurisdiction and with material irregularity. (1912) M.W.N. 1076. E

(22) Arbitrator must decide the question, but not direct a settlement.

On a reference on the ordinary terms, the arbitrator must decide the very question submitted to him, and is not justified in lieu thereof in directing what seems to him an equitable arrangement on the whole. So, on a reference of all questions relating to an agreement for the sale of land, the sufficiency of the vendor's title being disputed, an award that the purchaser shall take a conveyance of the title with all its faults, receiving an indemnity, is invalid, as not finally settling the question of title. *Ross v. Boards*, 8 A. & E. 290=7 L.J. (N.S.) Q.B. 209. F

(23) Award directing execution of mutual and general releases.

If, on a submission of a cause and all matters in difference, the award order the defendant to pay the plaintiff a sum of money, and direct mutual and general releases to be executed, the award is final, although the arbitrator does not expressly adjudicate on some specific questions raised before him. *Birks v. Trippet*, 1 Saund. 92; *Wharton v. King*, 2 B. & Ad. 528=9 L.J. (O.S.) K.B. 271; *Addison v. Gray*, 2 Wilts. 292. G

(24) Award of sum as balance due on banking account.

Where the submission was of all matters in difference, an award that the defendant should pay to the plaintiffs a certain sum as the balance due on their banking account was held good; for no other matter in difference should be intended, unless the party seeking to impeach the award could show that there was some other matter in difference between them. *Ingram v. Milnes*, 8 East 445. See *Wyatt v. Curnell*, 1 Dowl. N.S. 327; *Day v. Bonnin*, 8 Bing. N.C. 219=6 L.J. (N.S.) C.P. 1; *Wynne v. Edwards*, 12 M. & W. 708=18 L.J. Ex. 222. *Russell*, 9th Ed., 198. H

(25) Presumptions in favour of award.

The Courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favour of its being

I.—“ Shall be final and binding ”—(Continued).

a final, certain, and sufficient termination of the matters in dispute. *Wood v. Griffith*, 1 Swanst. 48; *Hawkins v. Colclough*, 1 Burr. 274; *Harrison v. Creswick*, 13 C.B. 399=21 L.J.C.P. 118; *Carey v. Aitchison*, 2 B. & C. 170=1 L.J. (O.S.) K.B. 252. *Russell*, 9th Ed., 198. I

(26) Matter presumed to be decided when award is silent.

The award will be sustained although the arbitrator has omitted in his award to notice some claim put forward by a party, if, according to the fair interpretation of the award, it is to be presumed that the arbitrator has taken the claim into consideration in making his award. *Gray v. Gwennap*, 1 B. & A. 106; *Craven v. Craven*, 7 Taun. 644; *Dunn v. Warlters*, 9 M. & W. 299=11 L.J. Ex. 188; *Ferry v. Mitchell*, 12 M. & W. 792=14 L.J. Ex. 88; *Jewell v. Christie*, L.R. 2 C.P. 296=36 L.J.C.P. 168. J

(27) Objection that award is unreasonable.

The Court is always reluctant to entertain the objection that the award, as distinguished from the submission, is unreasonable. 14 C.L.J. 188. K

(28) Judicial notice of invalidity of award.

The Court ought to take judicial notice of the invalidity of the award, notwithstanding that neither party has taken any objection thereto. 13 A. 300 (P.C.); 2 N.L.R. 81. L

(29) Publication of award.

An award is to be considered as published when the parties have notice that it is ready for delivery on payment of the charges. *Musselbrook v. Dunkin*, 9 Bing. 605=2 M. & Scott. 740=1 D.P.O. 722=2 L.J. C.P. 71; *M'Arthur v. Campbell*, 2 N. & M. 444=5 B. & Ad. 518=4 L.J. K.B. 25. M

(30) Courts not to review awards upon merits.

(a) The Courts will not review awards upon the merits, they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact. 15 C.L.J. 110. N

(b) Where the award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact, and the Courts will not ordinarily review his discretion, provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on mere ground of mistake. 14 O.C. 308. O

(31) Power of Court to interfere with award.

Where an arbitrator divides property in a particular manner or in dividing it lays down certain directions or awards certain amounts to one party, his acts are well within his jurisdiction and the Court is not competent to interfere with the award on its merits. 15 Ind. Cas. 321. P

(32) Power of Court to alter award.

(a) The Court has no power to alter or amend the award. *Hall v. Alderson*, 2 Bing. 476; *Moore v. Bullin*, 7 A. & E. 595. Q

(b) It can only set it aside or remit it to the arbitrator.

(33) Arbitrator authorized to effect partition neglecting to do so.

Where the arbitrator was authorized, by the reference, to effect partition and he neglected to do so, his award is bad for want of finality and should either be set aside or remitted to the arbitrator. 6 S.L.R. 146. R

1.—“ Shall be final and binding ”—(Continued).

(34) Award upon a money claim—Claim for damages.

An award upon a money claim does not change the nature of the claim, but only fixes the amount due, and unless the award is performed, an action may be brought to recover the amount fixed by the award; but where the original claim is for damages, the award not only ascertains the amount of the damages, but creates a debt between the parties and extinguishes the original cause of action, even although the award has not been performed. *Parkes v. Smith*, 15 Q.B. 297=19 L.J.Q.B. 405; *Comings v. Heard*, L.R. 4 Q.B. 669=29 L.J.Q.B. 9; *Gascoyne v. Edwards*, 1 Y. & J. 19. Russell, 9th Ed., 308. S

(35) Award upon a judgment—Effect.

If a judgment be referred with other matters, and an award be made, the judgment is not extinguished and null, so as to make seizing under it a trespass; but an action may be brought for breach of the agreement to abide by the award or for maliciously seizing. *Barry v. Grogan*, 16 W. R. 727. T

(36) Award as to validity of a patent—Subsequent infringement—Estoppel.

(a) Where a question as to the validity and infringement of a patent was referred to arbitration, and the arbitrator found that the patent was not illegal and void, it was held that, in an action between the same parties for another infringement, the defendant was not estopped from again disputing the validity of the patent. *Newall v. Elliott*, 1 H. & C. 797. U

(b) The ground of this decision was that the action was not in respect of the same matter upon which the arbitrator had made his award, and it was only by inference that the award could be made a decision upon the points in dispute in the action, whereas an estoppel must be certain and not matter of inference. Russell, p. 309. V

(37) Award as to construction of a contract.

Where the parties to a contract referred the question of its construction to an arbitrator, it was held that his award was conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract. *Guerin v. Andouy*, 62 L.J.Q.B. 688. W

(38) No suit for any matter within scope of submission.

After an award has been made, no action can be maintained for any matter in difference within the scope of the submission which was not in fact brought before the arbitrator, nor can advantage be taken of it in answer to a motion for an attachment. *Dunn v. Murray*, 9 B. & C. 780=7 L.J. (O.S.) K.B. 390; *Dicas v. Jay*, 6 Bing. 519=8 L.J. (O.S.) C.P. 210. X

(39) Award extinguishes claims embraced in the submission.

A valid award ordinarily operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and the award constitute the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. 5 S.L.R. 240=15 Ind. Cas. 819; 33 B. 881; 19 M. 290; 11 Bom. L.R. 20, Y

I.—“ Shall be final and binding ”—(Continued).

(40) Award not conclusive on a matter not actually referred.

(a) An award on a submission of all matters in difference is no bar to the recovery of a demand which, though it existed as a claim at the time of the reference, was not then a matter in difference and had not been referred to the arbitrator. *Raves v. Farmer*, 4 T.R. 146; *Golightly v. Jellicoe*, 4 T.R. 147 n.; *Upton v. Upton*, 1 Dowl. 400. Z

(b) Nothing but the questions actually referred is concluded by an award. Thus a reference of the quantum of a demand does not waive any objection to the illegality of it in an action for the sum awarded due, and if the illegality is proved the award cannot be enforced. *Steers v. Lashley*, 6 T.R. 61. A

(41) Arbitrator cannot go beyond questions submitted.

(a) An arbitrator cannot, however, go beyond the precise questions submitted; it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. The submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters submitted; he cannot take upon himself an authority which the submission does not confer. 15 C.L.J. 110. B

(b) Where the matter in controversy submitted to the arbitrator was whether the plaintiff had a right of way over a specified strip of land, and not whether the plaintiff should have access to a particular part of the village across the land of the defendant, the arbitrator was bound to base his decision upon an investigation of the first question, and he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. 15 C.L.J. 110. C

(42) Conclusive effect of award in evidence.

The effect of an award in evidence as between the parties is most conclusive, and while unimpeached precludes other evidence being given to contradict it. *Whitehead v. Tattersall*, 1 A. & E. 491. D

(43) Ejectment—Award respecting title—Evidence.

In ejectment a previous award between the same parties, respecting the title to the land, is conclusive evidence of the right. *Doed. Morris v. Rosser*, 3 East 15. E

(44) Winding up a partnership—Liability of a party to account for items omitted.

On a reference of all matters in difference, for the purpose of winding up the affairs of a partnership, and dividing the capital, an item in the account of good debts owing to the partnership was accidentally omitted, and the award was made on the basis of that account, directing one of the partners to receive the good debts; the court of equity, to prevent the omission from being prejudicial to the interests of those entitled to the fund, directed the appointed partner to account for what he had received of the good debts beyond the amount estimated in the award. *Spencer v. Spencer*, 2 Y. & J. 249. F

1.—“ Shall be final and binding ”—(Concluded).

(45) Reference of disputes between two firms—Scope of the enquiry.

- (a) Where the arbitrators have to adjudicate on disputes between two firms, they must perforce enquire who the partners are, to discover, whether they have jurisdiction, whom they must serve with notices of their meetings, and the scope of their inquiry. 4 S.L.R. 196. G
- (b) Their decision, however, as to the liability of any individual as a partner of the firm, being a decision on a question of their own jurisdiction, is not final, and can be raised as an objection to the filing of the award. 4 S.L.R. 196. H

(46) One of the parties a firm—Finding whether a person is a member of the firm—Finality.

The finding of the arbitrators on the question whether a person was a member of the firm who were a party to the reference is not a finding which the parties have bound themselves to accept; it involves the issue whether they bound themselves to accept any finding at all, and it is not, therefore, final and is open to correction. 6 S.L.R. 127. I

(47) One award in respect of disputes pertaining to several contracts.

- (a) Where disputes pertaining to several contracts, involving questions common to all of them, are referred by one submission and one award is made in respect thereof, the award is not thereby rendered invalid. 4 S.L.R. 196.J
- (b) Where, after the amount due to the firm G by the firm B was paid to them by their guarantee broker in his capacity as such broker, the firm G has obtained an award against the firm B for the amount due to them, the award was not invalid on the ground that they had already received payment from their guarantee broker, as they would be bound to account to the guarantee-broker for all sums recovered under the award. Nor could the award be rendered invalid on the ground that the guarantee-broker was a partner of the firm B. 4 S.L.R. 196. K

(48) Essentials to deprive an award of its effect.

In order to deprive an award of its binding effect, it is not enough that it was not enforced or that even both parties objected to it, but there must be positive evidence that both parties agreed that the former state of things should be restored. 5 S.L.R. 240. L

2.—“ On the parties....claiming under them.”

(1) Award binds only parties.

- (a) An award can only bind the parties to the arbitration. 14 C.L.J. 188. M
- (b) A valid award on a voluntary reference is a final and conclusive judgment, as between the parties, respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal both as to fact and law. *Hodgkinson v. Firnie*, 3 C.B.N.S. 189=27 L.J.C.P. 66; *Keighley, Maxsted & Co., In re*, (1898) 1 Q.B. at p. 409, *per Lord Eshere*, M.R.; *Caledonian Rail. v. Turcan*, (1898) A.C. 256=67 L.J.P.C. 69 *Russell*, 9th Ed., 307. N

(2) Award has no force between strangers.

- (a) It is only as regards the parties to the submission, or those claiming under them, that an award has any force at all. *Evans v. Rees*, 10 A. & E. 151; *Lady Wenman v. Mackenzie*, 5 E. & B. 447=25 L.J.Q.B. 44. O

2.—“On the parties....claiming under them”—(Continued).

- (b) The authority of the arbitrators is directly created, and strictly limited, by the contract containing the submission, and they have no jurisdiction over any person who is not a party to the contract. 19 Ind. Cas. 363. P
- (c) Where one of the parties to the dispute to be referred to arbitration is a firm, it is not open to the other party to proceed to arbitration against either the firm, or its members individually. 19 Ind. Cas. 363. Q
- (d) In the latter case, it is competent for the arbitrators to decide whether a particular individual is or is not a member of the firm and to pass an award in regard to him accordingly. But the decision of the question would not be final, and is open to correction by the Court. 19 Ind. Cas. 363. R
- (e) In the former case, however, the arbitrators have no jurisdiction to determine the question of partnership and liability of the individual members of the firm. Any person alleged to be a partner may appear and deny his partnership, and if there are any persons who admit their liability as members of the firm, the arbitrators can note the protest of the objector and proceed with the reference as against the firm, leaving the question of the objector's personal liability to be determined by a competent Court in execution proceedings or by separate suit. 19 Ind. Cas. 363. S
- (f) When an award has been given against a firm, and an application is made to file the award in Court, an objection by a person that he is not a partner to the firm and not bound by the award, raises questions altogether outside the award. The question whether execution can issue under such award against a particular person is one that must be determined in execution proceedings, or in an appropriate suit. 19 Ind. Cas. 363. T
- (3) Reference by widow in possession of husband's estate—Whether binding on reversioners who are no parties.

Defendants, alleging that they were entitled to the estate left by the last male owner who had died joint with them, instituted a suit against his widows who had taken possession thereof, and a submission to arbitration was made of the matters in dispute. The plaintiffs' mother was also a party to the arbitration. An award was made therein, whereby one of the widows was given some villages absolutely, and the remaining villages were left in the possession of the two widows for their lives with a right of reversion to the defendants upon their deaths, and the defendants were declared to have been joint with the last owner. A decree followed upon the award. In a suit by the daughter's sons for a declaration that their grandfather was separate and that the award and the decree were not binding on them, held, that the award was really a compromise and, the widows not having properly represented the estate, the plaintiffs who were no parties either to the award or the decree were not bound by the same. 9 A.L.J. 778=14 Ind. Cas. 125. U

(4) Assignment of contingent right under award pending reference.

If a party, pending a reference, assign his contingent right under the award, and after an award in his favour receive the sum awarded from his opponent, an action for money had and received will lie against him at the suit of the person to whom he has assigned his claim; and if the one who has parted with his interest pay the arbitrator's charges on taking up the award, and receive from the party against whom the award has been made

2.—“*On the parties....claiming under them*”—(Concluded).

not only the sum awarded, but also that amount of the costs of the award for which the latter is made liable, the amount of the costs so paid over, as well as the sum awarded, may be recovered by the assignee in the same action. *Smith v. Jones*, 1 Dowl. N.S. 526. V

IX. The cost of the reference and award ¹ shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

(NOTES).

Corresponding English Law.

This rule is a verbatim reproduction of rule (i) of the First Schedule to the English Arbitration Act, 1889, 52 and 53 Vic., c. 49. W

1.—“*Cost of the reference and award.*”

(1) What are costs of reference.

- (a) Ordinarily, the expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of the reference. They include the costs of witnesses and the costs of a brief in the cause referred, prepared after the reference for the purposes of the arbitration. *Russell*, 9th Ed., p. 235. X
(b) This is the case even if the arbitrator expressly find that there are no matters in difference except in the cause. *Brown v. Nelson*, 18 M. & W. 897; *Uutting v. Evans*, M'Clel. 12. Y

(2) What are costs of award.

The costs of the award are the amount of the arbitrator's charges, which are usually paid to him when the award is taken up. As between the parties, if the arbitrator's demand be excessive, the costs of the award are such amount only as on taxation the master deems the arbitrator entitled to have claimed. *Brazier v. Bryant*, 2 Dowl. 600; *Dossett v. Gingell*, 2 M. & G. 870=10 L.J.C.P. 183. Z

(3) Costs of preparing submission after stay.

Where, on an action being stayed, as being contrary to an agreement to refer, the parties then prepared and executed a further submission, under which the arbitration took place, it was held that the costs of and incidental to the further submission were part of the costs of the reference. *Autothropic, &c., Co., In re*, 21 Q.B.D. 182; 57 L.J.Q.B. 488. A

(4) Costs of employing an accountant.

The costs of an accountant employed by the arbitrator, by consent of parties, to examine the defendant's books, and of the attendance of the plaintiff's solicitor with the accountant, may be costs of the reference. *Hawkins v. Rigby*, 29 L.J.C.P. 228=8 C.B.N.S. 271. B

(5) Arbitrator's charges whether subject to taxation.

- (a) Under this clause the arbitrator has power to specify in his award the amount of the costs of the award, and if he does so his charges are not subject to taxation. *Stephens & Co. and Liverpool, &c. Insurance Co., In re*, 86 Sol. J. 464. C

I.—“Cost of the reference and award”—(Continued).

(b) But if he does not fix the amount in the award itself, his charges are liable to taxation just as they were before the passing of this Act. *Prebble and Robinson, In re*, (1892) 2 Q.B. 602. D

(6) Award to fix amount of costs.

If no contrary stipulation is inserted in the submission, an arbitrator has power to fix the amount of his own charges provided he does so in and as part of his award, in which case they cannot be taxed. If the reference is to two arbitrators and an umpire, and the latter fixes the costs of the award and names a sum to cover the costs of the umpire and arbitrators, the award may be remitted to him to state how much of the sum fixed is for the umpire and how much for the arbitrators. *Re Gilbert & Wright*, 20 Times Rep. 164. E

(7) Costs of umpire.

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to award, the fees due to the arbitrators are part of the costs of the umpire. *Ellison v. Ackroyd*, 20 L.J.Q.B. 193. F

(8) Award should separate umpire's charges from arbitration charges.

An umpire should, in his award, separate the sum which he awards to himself for his charges, from the sum which he awards to the arbitrators for their charges. *Gilbert and Wright, In re*, 68 J.P. 143. G

(9) Arbitrator should give some direction as to costs.

When the costs of the cause, or of the reference or award, are stated by the submission to be in the discretion of the arbitrator, he should give some direction respecting them, as otherwise the Court may say that the award is not final. *Morgan v. Smith*, 9 M. and W. 427=11 L.J. Ex. 379; *Richardson v. Worsley*, 5 Ex. 613=19 L.J. Ex. 317; *Williams v. Wilson*, 9 Ex. 90=23 L.J. Ex. 17. H

(10) Arbitrator's charges usually notified.

The arbitrator usually notifies to the parties the amount of his charges, and takes care to have them paid before he delivers up his award. *Roberts v. Eberhardt*, 28 L.J.C.P. at p. 78. I

(11) Power to direct costs of award.

A reference by agreement giving power over the costs of the reference gives authority to direct as to the costs of the award. *Walker and Brown, In re*, 9 Q.B.D. 434=51 L.J.Q.B. 424. J

(12) Award failing to deal with question.

Where there is a reference under the submission of the parties, and the costs are left to the discretion of the arbitrator, but he fails to deal with them in his award, the Court will refer back the matter to the arbitrator to enable him to deal with the costs. *Warburg and Co. v. McKerrow and Co., 90 L.T. 644*. K

(13) Order of reference providing that costs shall abide the event—Discretion of arbitrator.

Instead of leaving the costs in the discretion of the arbitrator, the order of reference may provide that they shall abide the event, in which case the arbitrator has no control over the costs, and the award should be silent respecting

1.—“Cost of the reference and award”—(Concluded).

them. It is an excess of authority on his part to determine their amount. *Kendrick v. Davies*, 5 Dowl. 693; *Cockburn v. Newton*, 10 L.J.C.P. 207=9 Dowl. 676.

(14) Costs—Scale.

The costs are taxed usually as between party and party. *Eccles v. Blackburn Corporation*, 20 L.J. Ex. 858.

(15) Submission made before Act—Costs.

The Act is to apply to any "arbitration" commenced after the commencement of this Act under an agreement made before the commencement. This provision as to costs is deemed to be included in submissions made before the Act. *Williams and Stepney, In re*, (1891) 2 Q.B. 257 = 60 L.J.Q.B. 636.

THE SECOND SCHEDULE.

(See section 18.)

FORM I.

Submission to single arbitrator.

In the matter of the Indian Arbitration Act, 1899:—

Whereas differences have arisen and are still subsisting between A. B. of
and C. D. of concerning ;

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

(Signed) A. B
C. D

Dated the

FORM II.

Submission of particular dispute to single arbitrator.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas differences have arisen and are still subsisting between A. B. of
and C. D. of concerning

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

(Signed) A. B
C. D

Dated the

FORM III.

Appointment of single arbitrator under agreement to refer future differences to arbitration.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas, by an agreement in writing, dated the day of , 18 , and made between A. B. of and C. D. of , it is provided that differences arising between the parties thereto shall be referred to an arbitrator as therein mentioned;

And whereas differences within the meaning of the said provision have arisen and are still subsisting between the said parties concerning

Now we, the said parties, A. B. and C. D., do hereby refer the said matters in difference to the award of X. Y.

(Signed) A. B.
C. D.

Dated the

, 189 .

FORM IV.

Enlargement of time by arbitrator by endorsement on submission.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A.B.
of and C. D. of :—

I hereby enlarge the time of making my award in respect of the matters in difference
referred to me by the within (or above) submission until the day of 189 .

(Signed) X. Y.,

Dated the , 189 .

Arbitrator.

FORM V.

Special case.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A.
B. of and C. D. of :—

The following special case is, pursuant to the provisions of section 10, clause (b),
of the said Act, stated for the opinion of the :—

(Here state the facts concisely in numbered paragraphs.)

The questions of law for the opinion of the said Court are :—

First, whether.....
Secondly, whether.....

(Signed) X. Y.,

Dated the , 189 .

Arbitrator.

FORM VI.

Award.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A.B.
of and C.D. of :—

Whereas in pursuance of an agreement in writing dated the day of
, 189 , and made between A.B. of and C.D. of
, the said A.B. and C.D. have referred to me, X. Y., the matters in difference
between them concerning (or as the case may be);

Now I, the said X. Y., having duly considered the matters submitted to me, do
hereby make my award as follows :—

I award—

(1) that.....
(2) that.....

(Signed)

X. Y.,

Dated the , 189 .

Arbitrator.

PART II.

Provisions of the Code of Civil Procedure, 1908, dealing with arbitration.

CIVIL PROCEDURE CODE, 1908.

(ACT V OF 1908.)

ARBITRATION.

89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force¹, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

(NOTE).

1.—“Any other law for the time being in force.”

Applicability to O. XXIII, r. 3.

The words “any other law for the time being in force” in this section are applicable to O. XXIII, r. 3 of the Code. 15 Bom. L.R. 340. See 28 C.L.J. 482. A

SPECIAL CASE.

Power to state case for opinion of Court, 9. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

APPEALS FROM ORDERS.

104. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders:—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;
- (b) an order on an award stated in the form of a special case;
- (c)¹ an order modifying or correcting an award;
- (d)² an order filing or refusing to file an agreement to refer to arbitration;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(f)³ an order filing or refusing to file an award in an arbitration without the intervention of the Court;.

(2) ⁴ No appeal shall lie from any order passed in appeal under this section.

(NOTES).

1.—“Clause (c).”

Order modifying award how far appealable.

The provision in cl. (c) of sub-S. (1) of S. 104 of the Code that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal; and when an order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal preferred against that order, but the appeal is allowed against the order only in so far as it modified the award. 15 Ind. Cas. 519. B

2.—“Clause (d).”

Appeal against order rejecting application for reference.

Where an application for reference to arbitration is made in a pending case, and the Court, finding one of the defendants unwilling to have the case sent to arbitrators, rejects the application, despite the plaintiff's readiness to discharge the unwilling defendant from the array of parties, no appeal lies from such an order of rejection. 27 Ind. Cas. 731. C

3.—“Clause (f).”

(1) Appeal from an order filing or refusing to file an award.

(a) Under S. 104 (f), Civ. Pro. Code, an appeal is allowed only from an order filing or refusing to file an award in an arbitration *without the intervention of the Court*. These words refer to those proceedings only which are taken under paras. 20 and 21, Sch. II of the Code, and S. 104 (f) does not apply to cases falling under paras. 17—19 of the second schedule. 9 P.R. 1918=16 Ind. Cas. 996=248 P.L.R. 1918. D

(b) An appeal lies against an order filing an award made upon an arbitration without the intervention of the Court, even after a decree is passed upon the award. 18 C.W.N. 381=22 Ind. Cas. 391. E

(2) Arbitration to divide family property—Award of extra amount for marriage expenses—Appeal.

Disputes arose among the parties and they were referred to arbitration without the intervention of the Court. The arbitrator was required among other matters to ascertain what was the divisible property of the family and to divide it up. In doing so he awarded to one D an unmarried member of the family an extra sum equivalent to what had been spent in marriages of other members. He was also required to decide about the appellant's right of residence in the family house. There were other matters about certain expenses referred to him which were withdrawn by the parties. The arbitrator gave an award deciding all questions except the last two. He stated that the appellant and other members of the family had agreed that the lady would be allowed to live in a certain house and he therefore

3.—“*Clause (1)*”—(Concluded).

did not think it necessary to give any decision upon the question. He further stated that, as he was asked not to decide the question about expenses by all the parties, he did not decide it. The Court below passed a decree in accordance with the award. *Held*, the order being one filing an award in an arbitration without the intervention of the Court, an appeal lay against it.

Held also, that the arbitrator was justified in awarding D an extra sum equivalent to what had been spent in marriages of other members.

Held also, that the agreement of the parties whereby the appellant was given a right to reside in the family house did not absolve the arbitrator from deciding the question. 14 A.L.J. 481. F

(3) Appeal against an order to record an award.

No appeal lies against an order to record an award made by arbitrators. 29 C. 167; 1 Patna Law Journal 90. G

4.—“*No appeal shall lie... section.*”

N.B.—See notes under rules 16, 17, 21, Sch. II, *infra*. H

THE SECOND SCHEDULE 1.

ARBITRATION.

Arbitration in suits.

1. (1) Where in any suit² all the parties interested³ agree⁴ that any matter in difference⁵ between them shall be referred to arbitration⁶, they may⁷, at any time before judgment is pronounced, apply to the Court⁸ for an order of reference.
Parties to suit
may apply for order
of reference.

(2) Every such application shall be in writing⁹ and shall state the matter sought to be referred.

(NOTES).

I.—“*The Second Schedule.*”

(1) Old Act.

The second schedule to the present Civil Procedure Code corresponds to Ss. 506 to 526 of the old Code, Act XIV of 1882, r. 4, corresponding to S. 506. I

(2) Analysis of Schedule II.

(a) The first sixteen of the second Schedule of the Civil Procedure Code clauses exhaust the whole process of arbitration after the suit has been instituted and the parties desired to submit their differences to arbitration under the control of the Court. The Court under those sixteen clauses controls completely the whole course of the reference, indeed the reference is its own, and its jurisdiction is never at any time ousted until a good award has been made. In the event of an award having been made, but being set aside for any reason, the Court immediately resumes its jurisdiction and completes the trial of the action. The next class of cases provided for in the second Schedule are those in which persons who have not instituted any legal proceedings desire to submit any difference between them to

I.—“The Second Schedule”—(Continued).

arbitration. Having agreed to do so either party may then bring the agreement into Court, and, if resisted by the other party, his application to have the agreement filed and further action taken upon it will be treated as a suit. Thereafter, again the Court immediately assumes and retains control of the subsequent arbitration proceedings. The third and the last case provided for in the second Schedule is where the parties who have not come into Court have not only agreed to refer matters in difference between them to arbitration, but have obtained an award. Here again the party desiring to enforce the award may bring it into Court and upon proper proceedings obtain a decree in conformity with it. There remains only one single cl. 18 which is of an exceptional character, and virtually re-enacts a portion of S. 21 of the Specific Relief Act, which is declared to have no applicability to any arbitration proceeding provided for in the second Schedule. That clause, which is also to be found almost *in totidem verbis* in S. 19 of the Arbitration Act, provides for a special class of cases in which, after parties have agreed to submit matters in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of those matters. Then the other party may set up in bar of the suit the agreement to submit to arbitration. 16 Bom. L.R. 653 (656-7). J

(b) This schedule deals with arbitrations under three heads :—

- I. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court.
- II. Where parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court.
- III. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. 29 C. 167 (182) (P.C.) = 6 C.W.N. 226 = 29 I.A. 51. K

Rules 1 to 16 contemplate a reference to arbitration in a pending suit through the intervention of the Court. 15 Bom. L.R. 340; 27 A. 53 = 1 A.L.J. 398; 30 C. 218. L

The rest of the rules except rule 18 contemplate an agreement to refer to arbitration and a reference to arbitration when there is no suit pending between the parties.

Rule 18 provides for stay of a suit by a party to an agreement to refer to arbitration. 15 Bom. L.R. 340 = 19 Ind. Cas. 786 = 37 B. 639. M

In cases falling under Head I, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the irregularity of the proceedings up to that point. 29 C. 167 (183). N

In cases falling under Heads II and III, proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of

1.—“The Second Schedule”—(Concluded).

the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression, as defined in the Civil Procedure Code. 29 C. 167 (188). O

(3) Schedule not applicable to

- (i) Rent suits. 16 W.R. 160; 6 C. 251, *contra*, 2 A. 119. P
- (ii) Proceedings under the Arbitration Act, 1899. 29 C. 793. Q
- (iii) Proceedings in insolvency under the provisions of the Punjab Laws Act, 88 P.R. 1887. R
- (iv) The second schedule to the Civil Procedure Code does not apply to or contemplate a reference to arbitration by parties to a suit which is pending, outside of the suit and without the intervention of the Court. 15 Bom. L.R. 340=19 Ind. Cas. 786=37 B. 639. S

(4) Analogous Law.

Compare Rule 1 with :—

- (i) Ss. 152, 215 of the Indian Companies Act VII of 1913. T
- (ii) S. 127 of the Punjab Land Revenue Act XVII of 1887. U
- (iii) S. 208 of the N.W.P. and Oudh Land Revenue Act, 1901. V
- (iv) S. 16 of the Religious Endowment Act, XX of 1863. W
- (v) S. 160 of the Bombay District Municipal Act (Bom. Act III of 1901). X

2.—“In any suit.”

(1) Reference by Tahsildar in a mutation case.

In a mutation case, the parties made an application to the Tahsildar, who was a Magistrate of second class, stating that they would be bound by the award of one P. The Tahsildar made a reference to arbitration. Held, that the Tahsildar had no power to make the reference, and the award, not having been made on private reference, was *ultra vires*. 7 A.L.J. 69=5 Ind. Cas. 519. Y

(2) Application for mutation of names—Reference to arbitration—Suit in Civil Court based on title.

Where an Assistant Collector, either at the request, or by the consent of the parties before him, refers a dispute relating to mutation of names to three arbitrators, and in accordance with the award of the majority rejects the application, held that a subsequent suit based on title is not excluded from the jurisdiction of the ordinary Civil Courts, nor does the consent of the plaintiff to such reference to arbitration which is within the four corners of the Land Revenue Act operate as an ouster of the jurisdiction of the Civil Courts. 14 A.L.J. 85. Z

3.—“All the parties interested.”

(1) Conditions for a valid reference.

- (i) All the parties to the suit must desire a reference.
- (ii) They must all apply to the Court for an order of reference.
- (iii) They must apply either in person or by their respective pleaders specially authorized in writing, and.
- (iv) The application must be in writing and state the particular matter sought to be referred. 28 B. 629. A

3.—“*All the parties interested*”—(Continued).

(1-a) Parties to have power in relation to subject matter of reference.

Capacity to make a submission is co-extensive with capacity to contract; every person capable of entering into a contract may be a party to a submission; conversely, he who cannot contract cannot make a submission; and, as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a submission concerning a subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do, will be of no legal effect whatever. 21 C.L.J. 278=19 C.W.N. 948=28 Ind. Cas. 557. B

(2) *Ex parte* defendants nominally on record need not join in the reference.

(a) It is not necessary that all the parties to a suit or proceeding should, in order to give jurisdiction to arbitrators or to render their award valid and binding, join in reference to arbitration. It is necessary that the parties interested should join in the reference, and it is immaterial that the *ex parte* defendants nominally on the record and who have no interest in the subject-matter do not join in the reference by the other parties to the suit. 14 Ind. Cas. 562; 24 A. 229=22 A.W.N. 19. C

(b) The words “all the parties to the suit” in S. 506, Civ. Pro. Code, 1882, refer to the succeeding words, “and any matter in difference between them in the suit.” 24 A. 229=22 A.W.N. 19. D

(c) A suit was brought against several persons, one of whom was a minor. An official of the Court was appointed guardian *ad litem* for the minor defendant, but he did not put in an appearance. The parties, with the exception of the said minor, applied to the Court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators, whereby the minor was exempted from the plaintiff's claim. Objections being taken to the award, held that the minor, not having put in an appearance, nor contested the suit, was not a person interested in the matters which were referred to arbitration, within the meaning of S. 1, Sch. II of the Code, and his not joining in the reference did not invalidate it. 7 A.L.J. 807=7 Ind. Cas. 68=32 A. 657. E

(3) Suit for partition—Widow in possession if necessary party for a reference.

A Hindu widow in possession of property in lieu of maintenance is not a necessary party to a suit for partition instituted by the male members of the family. Where therefore a suit for partition, in which such a widow is a defendant, is referred to arbitration without the widow joining in the reference, the award is a valid and legal award. 11 A.L.J. 66=18 Ind. Cas. 609=35 A. 107. F

(4) Interest relates to the time when the reference is made.

The question whether a party is interested or not in a reference to arbitration depends upon his position at the time when the reference is made. 8 A.L.J. 645. G

(5) Reference not joined in by all parties, legality of.

A reference to arbitration on petition not joined in by all the parties to a suit is illegal. 26 M. 47. H

3.—“All the parties interested”—(Continued).

- (5-a) Reference by only some of the parties—Objection as to non-joinder, waiver of.

Where the plaintiff and some of the defendants joined in a petition for reference to arbitration without making the other defendants parties, and at no stage before the Court any objection was taken upon the ground of non-joinder.

Held, that the reference to arbitration was not bad by reason of non-joinder, for, applying the principle set forth in r. 18 of O. I of the Civ. Pro. Code, the right to object upon that ground was waived. 28 Ind. Cas. 862. I

- (6) Reference by some not binding on others.

(a) A reference by some of the parties is not binding on the others. 7 A.W.N. 215; 11 C. 87. J

(b) Persons who are no parties to the reference will be bound by it if they subsequently ratify it. 109 P.R. 1883. K

- (7) Submission by plaintiff and one defendant—Another defendant's signature obtained later—Effect.

A sued his brothers B and C for partition, and D and E, the minor sons of B, and M, mother of plaintiff, were also defendants. On the 6th April, 1908, during the pendency of the suit, A and B executed a muchilika whereby they agreed out of Court to refer their dispute to five arbitrators. C signed the muchilika later. On the next day A withdrew from the submission. A petition was subsequently put in on behalf of B, C, D and E under Ss. 375 and 528 of the Code of 1882, praying that the matter may be referred to arbitrators as originally agreed. A opposed this petition on the grounds that (i) C did not sign the reference along with A and B; (ii) the other defendants were not parties to the reference; and (iii) S. 523, Civ. Pro. Code, did not apply to pending suits. The lower Court found that the agreement to refer was true and that permission was subsequently obtained on behalf of the minor defendants D and E to settle the dispute by arbitration, and it therefore ordered the matter to be referred to arbitrators on the ground that the reference was a bar to the further hearing of the suit. *Held*, that as plaintiff was not a party to the order, it was not one passed under this rule. 10 M.L.T. 248. L

- (8) Award in a reference not joined in by all parties—Validity.

(a) An award passed without the submission to arbitration of all the parties interested in the subject-matter of it, and without an order of the Court as prescribed by rule 3, referring the matter in dispute to the determination of arbitration and fixing a time for the making of an award, is not an award in law. 6 A.L.J. 333=1 Ind. Cas. 146; 8 C.W.N. 873. But see 4 P.R. 1882; 11 C.W.N. 1152, *infra*. M

(b) Where a defendant, who had appeared and filed a written statement, did not join in the application for the order of reference, an award made on a reference, by Court, is illegal. 17 M.L.J. 394. N

(c) Where a defendant did not join a reference, though the submission was signed by the pleader for all the defendants, and the award was objected to by the non-joining defendant, there was no valid award such as could bind any of the defendants. 4 A.L.J. 347=A.W.N. (1907) 147=29 A. 423. O

3.—“*All the parties interested*”—(Continued).

- (d) An award of the arbitrators is not binding on a person not a party to the reference, though, during the arbitration, he produced a document before the arbitrators in obedience to a summons. 5 C.W.N. 268. P
- (e) An award is evidence against the parties concerned. 15 W.R. 427. Q
- (f) An award made on a reference not consented to by all the parties to the suit is not a nullity, and the party in whose favour it is made is entitled to have a decree upon it, provided the opposite party does not show cause why it should not be given effect to. 4 P.R. 1882. R
- (g) An award on a reference made by Court in the course of a suit cannot be set aside on the ground that all the parties to the suit did not join the reference. 11 C.W.N. 1152. S
- (h) A suit for injunction was referred to arbitration. The reference was by the plaintiff and one of the defendants, who were all near relations. On the conclusion of the reference proceedings, and on the objection of the parties, who had not joined in the reference, it was found by the first Court that they were well aware of the proceedings, raised no objection to the reference, remained quiescent with a view to seeing whether the award was in their favour, and had come forward simply because it was against them and hence they had waived their right to contest the irregularity of the reference to arbitration. The Lower Appellate Court further held that, having regard to the conduct of the objecting parties, the words of the r. 1, Sch. II of the Code of Civil Procedure, ‘all the parties interested’ must be very strictly construed, and that the defendant, who did not take the trouble to appear in Court, could not be held to be “interested” within the terms of the rule.

Held, that, on the facts disclosed, there was no ground for interfering on revision with the decree passed in terms of the award under the reference. 78 P.L.R. 1918=16 Ind. Cas. 761. T

(9) Reference by some of the parties and trial between others.

- (a) The Code does not contemplate a reference to arbitration between the plaintiff and one defendant, and a trial between the plaintiff and another defendant. 8 A.L.J. 645. U
- (b) A suit was brought against two persons. The plaintiff and one of the defendants referred the matters in dispute to arbitration. The award was given by two of the arbitrators, whereby the non-joining defendant was exempted from the plaintiff's claim, and the suit was dismissed. Objections were taken to the award but they were overruled and a decree was passed in accordance with the award. *Held*, that the reference was invalid and the award which followed thereon was not a valid award. 8 A.L.J. 645. V

(9-a) Reference by one partner—Others if bound.

A sum of money, paid by a customer as the result of a reference to arbitration in which the legal personal representatives of a deceased partner were no parties, having been brought into the partnership accounts, the latter, who did not dispute the item in the first Court, for the first time on appeal contended that, not being parties to the reference, they were not bound by it.

3.—“All the parties Interested”—(Continued).

Held, that the question whether the legal personal representatives of the deceased partner were bound by the agreement to refer and by the award was not a simple question of law to be decided without reference to the facts of the case or any evidence which might have been available if it had been raised at the proper time, and the contention should have been rejected as having been put forward at too late a stage.

Held further, that if the legal personal representatives of the deceased partner were not bound by the award, they would not be entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into. That if relief could be given on this footing the difference between the amount originally claimed against the customer and the amount paid by him under the award would not necessarily be the measure of damages; nor could the *onus* of proving that it was any less sum be thrown on the person accused of negligence and improper conduct. 18 C.W.N. 1025=27 M.L.J. 192=(1914) M.W.N. 876=16 M.L.T. 521=17 Bom. L.R. 5=24 Ind. Cas. 307=21 C.L.J. 1 (P.C.). W

(10) Person not a party to award, whether can take benefit under it.

Where, in an award to which the plaintiff was no party, a provision was made that defendant should pay Rs. 100 to plaintiff on the responsibility of his share of the property, and it was intended entirely for the benefit of the defendant's brother. *Held*, that there was no trust created in favour of the plaintiff, and that he acquired no interest under the award as he was no party to it. 5 M.L.T. 199. X

(10-a) Agreement to refer not binding—Acceptance of benefit—Effect.

An agreement to refer not originally binding might become binding later on by the acquiescence of the party or his acceptance of benefits thereunder. 27 M.L.J. 192=21 C.L.J. 1 (P.C.)=17 Bom. L.R. 5. Y

(11) Party added afterwards.

Where a submission has, in the first instance, been made between two, a third party may be added afterwards, and the reference may proceed as if all three had been parties to the original order of reference. *Winter v. Munton*, 2 Moore 723. Z

(12) Power of certain persons to refer for others.

(i) GUARDIAN.

(a) The guardian has authority to agree to a reference to arbitration on behalf of the minor, and, in the absence of fraud or gross negligence, the agreement is binding on the minor, notwithstanding that the sanction of the Court was not obtained therefor. 28 A. 35=2 A.L.J. 498=A.W.N. (1905), 171; 4 P.R. 1907; 8 C.L.J. 294. But see *infra*. A

(b) A natural guardian or a guardian *ad litem* is competent to refer a matter in difference to arbitration: the reference and the award will be binding on the minor where they are for the benefit of the minor. 19 C.-334; 37 P. R. 1895. B

(c) An award as to division of property left to minors, though assented to by their guardian may be set aside so far as it affects them on proof that the partition is injurious to them. 1 W.R. 280. C

3.—“*All the parties interested*”—(Continued).

- (d) In 251 P.W.R. 1912=125 P.R. 1912, the Punjab Chief Court has held that a reference to arbitration on behalf of minor without the sanction of the Court is not bad, even if O. XXXII, r. 7, Civ. Pro. Code, applies to reference to arbitration, if the submission has been made through the Court and arbitration has been deliberately selected. D
- (e) If a reference was made with the consent of the persons having no authority to act on behalf of the guardian of an infant party, the guardian *ad litem* could set aside the award within the time prescribed by Art. 158 of the Limitation Act. 18 C.L.J. 35. D-1
- (f) Where an agreement is made by a guardian on behalf of a minor to refer to arbitration the whole or any part of a dispute already in litigation, the agreement requires the sanction of the Court. In the absence of such sanction, neither the submission to arbitration nor the award based thereon will be binding on the minor. 17 C.P.L.R. 147; 24 M. 826; 3 Bom. L.R. 431=26 B. 76; 13 P.J. 1896, p. 610; 37 P.R. 1895; 105 P.R. 1889; 18 P.R. 1891. E
- (g) A reference to arbitration is itself an agreement and is, in the case of minor parties, subject to the provisions of O. XXXII, r. 7, Civ. Pro. Code, 1908. 19 Ind. Cas. 424. F
- (h) The agreement contemplated in Civ. Pro. Code, Sch. II, paragraph 1 *et seq.* is an “agreement with reference to the suit” under O. XXXII, r. 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule. 80 M.L.J. 465=32 Ind. Cas. 881. G

N.B.—The latter set of rulings proceed on the basis that a reference to arbitration is an agreement “with reference to the suit” within the meaning of S. 462, Civ. Pro. Code, 1882.

(ii) NEXT FRIEND.

There is nothing to prevent a next friend from referring the minor's interests to arbitration. 92 P.R. 1885. See 19 P.R. 1891. H

(iii) FATHER IN A JOINT HINDU FAMILY.

In a joint Hindu family, the father, as manager of the family has authority to go into arbitration for the purpose of dividing property which, on partition, would devolve on him and his sons. 16 A. 231=14 A.W.N. 60 I

(iv) MANAGER OF A JOINT HINDU FAMILY.

(a) The Manager of a joint Hindu family, even when he is not the father of the family, has power to bind the family by a reference of its dispute with any intruder regarding any family property to arbitration provided such reference be for the benefit of the family. 27 B. 287=5 Bom. L.R. 95; 9 M.L.J. 34. J

(b) The two heads (*kartas*) of two branches of a joint Hindu Mitakshara family agreed to have a partition made, and for the purpose a reference was made to arbitration. One *karta* executed the deed of reference on his own behalf and as guardian of his minor nephew. Held, that the *karta* had full power to act as guardian of the joint property of himself and his minor nephew, and to deal with it for the purpose of making the reference to arbitration. 7 Ind. Cas. 31. K

3.—“All the parties interested”—(Continued).

(c) The Court should decide definitely whether the reference to arbitration was for the benefit of the minor so as to be binding upon him. 7 Ind. Cas. 31. L

(v) MUKTEAR.

Without special authorisation, a muktear, cannot bind his principals to a submission to arbitration. 11 P.R. 1869; 1 Agra Rev. 49; (*Ibid.*) 63. M

A suit for partition was filed on behalf of a minor by his next friend, a lady, who gave a *Mukhtarpatra* in general terms to a male relation. The *Mukhtarpatra* did not refer expressly to submission to arbitration. Subsequently, the *Mukhtar* without bringing to the notice of the Court that he was consenting to a reference on behalf of the minor, agreed to a reference to arbitration. An award was made on this reference. Meanwhile, the plaintiff attained majority and declined to be bound by the award: *Held*, that the plaintiff was entitled to have the award set aside. 19 Ind. Cas. 424. N

(vi) ATTORNEY.

(a) An attorney cannot refer to arbitration unless expressly authorized by his power of attorney to do so. 6 N.W.P.H.C.R. 210. O

(b) In *Swinfen v. Swinfen*, 27 L.J.N.S. Chan. 35, Sir John Romilly, M.R., observed that “if an attorney is employed to conduct a suit for a client, a compromise does not in terms come within the scope of his authority, it is not within the management of the cause.” P

(vii) PLEADER.

(a) A pleader has no authority to apply for an order of reference, unless he is expressly authorised so to do. A *vakalatnamah* in general terms is wholly insufficient. 4 A.L.J. 342= A.W.N. (1907) 139=29 A. 429. See 2 M.H. C. 428. Q

(b) Reference to arbitration made by a pleader, not specially authorised to make it, in the absence of acquiescence by the party concerned, is not valid. 7 C.W.N. 343. See 16 W.R. 160; 1 W.R. 80. R

(c) An application for reference signed by a pleader holding a defective *vakalatnamah* is not binding on the party whom the pleader purported to represent. 29 A. 428=4 A.L.J. 347=A.W.N. (1907) 147. S

(d) Where a pleader holding a *vakalatnamah* in general terms applied for an order of reference to arbitration, and no objection was raised to the reference on the ground of want of authority on the part of the pleader, the award and the decree, which followed, were not disturbed. 29 A. 429=4 A.L.J. 342=A.W.N. (1907) 139. T

(e) Where a party, on whose behalf an application for reference is signed by his pleader, knows about it and acquiesces in it, he cannot raise the objection of want of authority in the pleader afterwards. (*Ibid.*) U

(viii) PARTNER.

A firm cannot be bound by the reference to arbitration, made at the instance of one partner alone. 22 A. 135=A.W.N. (1900) 12 3 S.L.R. 5; 1 Bom. L.R. 828. V

(ix) RECOGNIZED AGENT.

(a) The recognized agent of a party can submit a matter in dispute to arbitration, 1 P.R. 1882; 48 P.R. 1882, even where there is no special form of authorisation in that behalf. 51 P.R. 1893. See *contra* 170 P.R. 1893. W

3.—“All the parties interested”—(Concluded).

- (b) Where a person authorizes his agent to conduct a suit for him, and the latter assents to a reference to arbitration, which the former not only ratifies but of the conducting of which by the arbitrators he is fully aware, he cannot, after the award has been made, seek to have it set aside either on the ground that the case was referred to arbitrators without his knowledge and consent; or that his pleader was not specially authorised. 9 M. 451. See, also, 24 C. 469. X

(x) EXECUTOR.

- (a) An executor against whose application for probate a *caveat* has been entered, cannot submit to arbitration the question whether the will propounded by him was genuine. 21 B. 335. Y
- (b) The executor and the caveatator cannot refer to arbitration the question of genuineness of the Will, nor can the Court make such a reference under S. 509 of the C.P.C., 1882. 14 C.W.N. 924=12 C.L.J. 185. Z
- (c) An executor or administrator is, under certain circumstances, for example, for the settlement of any debt, account or claim in relation to the estate in his hands, competent to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority. But an executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. 21 C.L.J. 278=19 C.W.N. 948=28 Ind. Cas. 557. A

(12 a) Application to Court to act as arbitrator.

The application to the Court to act as an arbitrator is not an application to make a reference. 26 Ind. Cas. 355. B

(13) All parties not joining in reference—Waiver of right to contest—Revision.

A suit for injunction was referred to arbitration. The reference was by the plaintiff and one of the defendants, who were all near relations. On the conclusion of the reference proceedings, and on the objection of the parties, who had not joined in the reference, it was found by the first Court that they were well aware of the proceedings, raised no objection to the reference, remained quiescent with a view to seeing whether the award was in their favour, and had come forward simply because it was against them and hence they had waived their right to contest the irregularity of the reference to arbitration. The lower appellate Court further held that, having regard to the conduct of the objecting parties, the words of the rule 1, Sch. II of the Code of Civil Procedure, ‘all the parties interested must be very strictly construed, and that the defendant, who did not take the trouble to appear in Court, could not be held to be “interested” within the terms of the rule. Held, that on the facts disclosed, there was no ground for interfering on revision with the decree passed in terms of the award under the reference. 78 P.L.R. 1913. C

4.—“Agree.”

(1) Necessity for consent of parties to reference.

The parties interested must consent to the reference. 10 M.I.A. 413 (427)=5 W.R. (P.C.) 21. D

4.—“Agree”—(Continued).

(2) Court cannot coerce parties to consent to reference.

Both the parties must voluntarily consent to the reference and any sort of coercion on the part of the Court to induce one of the parties to consent will vitiate the reference. 28 P.R. 1868. E

(3) Court cannot compel submission to arbitration.

(a) Although a Court may recommend submission, it cannot order the parties to submit to a reference. 52 P.R. 1869. F

(b) The Court has no power of its own motion to order a reference to arbitration, and it can do so only in the manner prescribed by the Code. 1 Bom. L. R. 617=23 B. 629. G

(4) Reference secured by misrepresentation and undue influence.

A person, who secures a reference to arbitration by misrepresentation and undue influence, should not be allowed to benefit by his wrong-doing, and it is unjust that a person affected by an award so obtained should be precluded from contesting its validity in an application for filing the award and be driven for a separate regular suit. 25 C. 757; 17 A. 21; 7 Ind. Cas. 81. H

(5) Refusal to submit—Presumption.

Refusal to submit to arbitration cannot raise any presumption against a party to a suit. 20 W.R. 172. I

(6) Revocation of agreement to refer.

(a) A submission cannot be revoked except for good cause shown. An arbitrary revocation is not permitted. 12 M.I.A. 130; 15 W.R. 831; 17 W.R. 516; 9 P.R. 1870; 8 M.H.C. 46; 17 C. 200; 7 A. 278; 20 A. 145; 17 B. 129; 27 M. 112; 7 C.W.N. ccii; (1880) S.C. (Oudh) Part X, No. 14. J

(b) As regards the revocation of the authority of an arbitrator, the policy of the Indian Legislature has always been different from that in England, and the English Common Law Rule, which made a submission revocable at any time before the award was made, has not been followed. According to the law in India, the submission of an existing dispute once made is not, without just and sufficient cause, revocable even in the case of a submission which has not been made a rule of Court; while, with reference to a submission which has been made a rule of Court, and consequently, where the matter has become the subject of a suit, the submission can be revoked only with the leave of the Court for good cause shown. 27 M. 112. K

(c) In 12 M.I.A. 112, Lord Romilly observed as follows:—"The direction of recent legislation both by English Acts and the Acts of the Indian Legislature has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration, and to put such agreement for arbitration on the same footing, as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract." L

(d) Under the present English Arbitration Act, 1893 (52 and 53, c. 49), S. 1, a submission, unless a contrary intention is expressed therein, is irrevocable except by leave of the Court. M

4.—“Agree”—(Continued).

(7) Good cause for revocation.

The authority conferred on the arbitrator can be revoked only for one or other of the causes mentioned in S. 5, *infra*. 10 B. 381; but, see, 17 C. 200; 29 A. 18, *infra*. N

(8) Long and unreasonable delay on the part of a party to prosecute proceeding.

Where there is a long, unexplained and unreasonable delay on the part of a party to prosecute proceedings before the arbitrator, and the other party did not consent to it, the latter is *prima facie* entitled to decline to go on with the reference and to insist on revoking the agreement to refer. 17 C. 200. O

(9) Indebtedness of arbitrator to a party.

Where an arbitrator, being indebted to one of the parties at the time of the reference or becoming so indebted after the reference, fails, in either case, to disclose the fact to the other party, such party is entitled to revoke the reference on discovery of the fact. 29 C. 278. See, also, 25 C. 141. P

(10) Collusion of arbitrator.

Where the arbitrator is in fraudulent collusion with the defendant, the submission can be revoked. 29 A. 18=3 A.L.J. 613=A.W.N. (1906) 253. Q

(11) Arbitrator, *am-mooktear* of one of the parties.

If after reference it transpires that the arbitrator has been acting as *am-mooktear* of one of the parties without remuneration, the other party can withdraw from the reference. An award made by such arbitrator, after receipt of notice of revocation, cannot be enforced by suit. 29 C. 278=6 C.W.N. 285. R

(12) Arbitrator exceeding authority by receiving improper evidence.

In an arbitration to ascertain the total amount of loss from fire to a mill the arbitrators were right in allowing the owner to give evidence to prove that the machinery was seriously injured not only by the fire but by the act of the insurance company in allowing the water used to extinguish the fire to lie on the machinery while the company was in possession of the mill. And the petition of the insurance company to revoke the submission to arbitration on the ground that the arbitrators had exceeded their jurisdiction in admitting the said evidence must be dismissed. 17 C.L.J. 154 (P.C.)=13 M.L.T. 11=11 A.L.J. 42=15 Bom. L.R. 19=(1913) M.W.N. 64=17 C.W.N. 269. S

(13) Effect of agreement to refer on pending suit.

A registered agreement to refer during the pendency of a suit bars the further prosecution of the suit. A.W.N. (1888) 133. T

(13-a) Agreement to refer to arbitration, whether amounts to adjustment of suit.

(a) An agreement by the parties to a suit to refer a dispute to arbitration does not come within the scope of O. XXIII, r. 3 of the Code of Civil Procedure, inasmuch as such an agreement does not finally dispose of the suit, as there is still a great deal of judicial work to be done, evidence has to be considered and weighed, and a judicial opinion arrived at. 23 C.L.J. 482. U

(b) Where, however, the parties presented a petition to Court, and agreed that the case should be finally disposed of in one way if a simple fact was found to

4.—“Agree”—(Concluded).

exist and in another way if it was found not to exist, the agreement came within the terms of O. XXIII, r. 3 of the Code, as no further judicial action was necessary; and the agreement, being capable of enforcement, the losing party should not be entitled to repudiate it after the fact, on which it depended, had been ascertained. 28 C.L.J. 482. Y

(14) Withdrawal of suit after reference, permissibility of.

Court has no jurisdiction to permit a plaintiff to withdraw his suit, with liberty to bring a fresh suit, after the arbitrator had made an award. 7 C.W.N. 186. W

5.—“Any matter in difference.”

(1) Reference of matter in issue.

Only matter in issue before Court can be referred to arbitration. 14 W.R. 469. X

(2) Reference of the whole matter.

A— in dispute between the parties may be a reference of a particular matter. 167 P.R. 1889. Y

(3) Revocation of probate.

An application for revocation of a grant of probate cannot be referred to arbitrators for their decision, even with the consent of the parties. 72 P.R. 1894. Z

(4) Claim for custody of minor wife.

A Court cannot delegate to arbitrators the question, whether or not a claim for custody of a wife should be decreed, such question, especially when either party is a minor, being entirely one for the discretion of the Court. 87 P.R. 1895. A

(5) Pure question of law.

Pure questions of law may be referred to the decision of an arbitrator. 21 C.L.J. 278. B

6.—“Shall be referred to arbitration.”

(1) Agreement to be bound by oath.

An agreement to be bound by the statement of a particular person on oath is in the nature of a reference to arbitration. 4 A. 302. C

(1-a) Arbitrator and commissioner, difference between.

There is a difference between the positions of an arbitrator and a Commissioner. The latter submits his report for the approval of the Court and has no greater power than what the parties or the Court nominating him chose to give him, whereas the former has a final authority to settle all matters in difference between the parties which form the subject of the reference, subject to the power of the Court to set aside the award if certain specific circumstances affecting his conduct are proved to exist. 25 Ind.Cas. 297. D

(2) Reference to settle price—Decree on valuator's award.

Valuators not being arbitrators, no decree on the award of the valiators can be made under S. 16 (2) of this schedule. 5 C.W.N. 242=28 C. 155. E

6.—“*Shall be referred to arbitration*”—(Concluded).

(3) *Filing of reference.*

A Court has power to file a reference to arbitration, notwithstanding the denial by the defendant of the agreement to refer. 84 P.R. 1901. F

(4) *Question as to regularity of proceedings.*

In cases of reference under this section, no question can arise as to the regularity of the proceedings up to the order of reference by the Court. 6 C.W.N. 226=29 C. 167. G

(5) *Objection as to validity of reference—Second appeal.*

An objection by a party that his muktear was not specially empowered to refer the case to arbitration could be urged in second appeal, though not raised in the first appellate Court. 11 P.R. 1869. H

7.—“*They may.*”

Section is an enabling one.

This section is an enabling section and is not intended to be restrictive or exclusive. 24 W.R. 41. I

8.—“*Apply to the Court.*”

(1) *Application for reference must be presented to the Court.*

An application for reference to arbitration, to be operative, must be presented to the Court. It cannot be entertained by a Commissioner appointed to examine a witness. 10 C.L.J. 449=4 Ind. Cas. 370. J

(2) *Dispute in suit may be referred to private arbitration.*

Parties can agree to refer disputes pending in a suit between them to private arbitration without making an application to Court. (1916) M.W.N. 203 = 19 M.L.T. 228. K

9.—“*Every such application shall be in writing.*”

(1) *Application for reference should be in writing.*

An application for a reference to arbitration must be in writing. 16 W.R. 160; W.R. (1864), Act X, Rul. 41; 1 W.R. 80; 67 P.R. 1879; 6 M.I.A. 134. L

(2) *Provision directory—Non-compliance an irregularity.*

The provision that an application for reference to arbitration shall be in writing is directory only as to the form in which the application should be made, and non-compliance with the provision does not render the reference a nullity, but is only an irregularity which can be cured. 4 C.W.N. 92=27 C. 61; A.W.N. (1907) 278=4 A.L.J. 691=30 A. 32; 23 B. 629. M

(3) *Agreement to refer not in writing, effect of.*

Agreement to refer to arbitration, not in writing, is not an adjustment of suit. 7 C.W.N. 180. N

(4) *Application to refer not in writing—When not objectionable.*

An application for reference, made in open Court in the presence of all the parties and with their consent, was not required to be in writing. 2 N.W.P. 419; 1 M.H.C.R. 106. See, also, 24 W.R. 41. O

(5) *Application for reference not in writing—Ratification by conduct.*

Parties to a suit agreed to refer their case to arbitration, and in the presence of the Mukhtar of the plaintiff and a Revenue Agent on behalf of the defendant, the order referring the case to arbitration was passed by the Court.

9.—“Every such application shall be in writing”—(Concluded).

There was, however, no application in writing signed by the parties consenting to arbitration. Subsequently the parties appeared in person before the arbitrator and even evidence was taken in their presence. On an objection that there was no valid reference to arbitration according to law. *Held*, that the parties to the suit could ratify the reference to arbitration, although the requirements of this rule had not been strictly followed by the Court in the first instance. 9 Ind. Cas. 412. P

(6) Oral application made by parties reduced to writing by Judge.

When parties apply orally to the Judge to refer the suit to arbitration, and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him having regard to the provisions of rule 5 *infra* to supersede that reference, the arbitrator not having declined to act. 4 A.L.J. 691 = A.W.N. (1907) 278 = 80 A. 32. Q

(7) Application written by all parties interested—Presentation by one—Effect.

The parties to a pending suit agreed between themselves out of Court to nominate certain arbitrators to decide their dispute, and in pursuance of their agreement, had a petition written for presentation to the Court. But the defendant refusing to join in the presentation of petition, the plaintiff alone presented it in Court. *Held* that as both the parties did not make the application to Court, Art. 1 of this schedule applied, and no order of reference could be made under Art. 8, *infra*. 9 Ind.Cas. 195 = 17 P.R. 1911 = 50 P.L.R. 1911. See, also, 25 P.R. 1912; 12 M.L.J. 77; 29 C. 167; 26 M. 47; 9 C.W.N. 873. R

(8) Signature on application for reference, absence of.

A minor represented by a guardian *ad litem* was a party to a suit. The guardian *ad litem* entered into an agreement signed by all the parties to the suit including himself to refer the matters in dispute to two arbitrators and in case of difference between them to an umpire. The parties made an application for reference which was not signed by the guardian although he was present in Court. The Court made an order of reference to two arbitrators whose award challenged an umpire was appointed. An application against the umpire's award was unsuccessfully made under para. 15, Schedule II of the Civil Procedure Code, 1908. On review of this order the arbitration proceedings were set aside on the grounds that the application for arbitration was not signed by the guardian *ad litem* and that umpire had opened the case *de novo* and had not taken the evidence called for.

Held, that the application for order of reference did not require signature as of necessity and that no injustice was caused to the minor whose guardian was present in Court at the time the application was presented. 32 Ind. Cas. 161. S

Appointment of 2. The arbitrator shall be appointed 1 in such arbitrator. manner as may be agreed upon between the parties. 2

(NOTES).

(1) Old Act.

This rule corresponds to S. 507 of Act XIV of 1882. T

(2) Analogous Law.

Compare (i) S. 7 of the Indian Arbitration Act.

(ii) S. 129 of the Punjab Land Revenue Act, XVII of 1887. U

I.—“Shall be appointed.”

Record should show appointment.

Appointment of arbitrators should appear clearly from the record. Old S. C.
60 (O.C.). Y

2.—“As may be agreed upon between the parties.”(1) **Parties must consent to nomination of arbitrator by Court.**

The parties to a reference must either name the arbitrators or consent to their nomination by the Court; therefore, an award made by arbitrators appointed by the Court without the consent of one of the parties and in spite of protest is not binding on him and is liable to be set aside. 5 W.R. (P.C.) 21=10 M.I.A. 413=1 Ind. Jur. N.S. 161. W

(2) **Parties not agreeing in nominating arbitrator.**

Where no arbitrator has been named in the agreement and the aid of the Court is sought for the appointment of an arbitrator, the Court ought to allow the parties an opportunity of being heard as to the selection of an arbitrator. 17 C. 200. But see 7 W.R. 18. X

(3) **Acceptance of office by arbitrator.**

A person should not be nominated as arbitrator until the Court ascertains whether he is willing to accept the office. W.R. (1884) p. 339. Y

3. (1) The Court ¹ shall, by order, refer to the arbitrator ² the matter in difference which he is required to determine, ³ and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order ⁴.
Order of reference.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter ⁵ in the same suit.

(NOTES).

(1) **Old Act.**

This rule corresponds to S. 508 of Act XIV of 1882. Z

(2) **Analogous Law.**

Compare :—(i) S. 215 (2) of the Indian Companies Act, VII of 1913.
(ii) S. 128 of the Punjab Land Revenue Act, XVII of 1887.
(iii) S. 16 of the Religious Endowments Act, XX of 1868.
(iv) S. 208 of the N.W.P. and Oudh Land Revenue Act, III of 1901. A

I.—“The Court.”(1) **Power of appellate Court to refer to arbitration.**

(a) The appellate Court has power to refer a case to arbitration if the parties to the appeal pray for such reference. 18 C. 507; 3 M. 78; 7 N.W.P. 243; 1 C.P.L.R. 118; 10 A. 8=A.W.N. (1887) 240; S. C. Oudh 25; *contra* 12 B.L.R. 266 (F. B.)=21 W.R. 210. B

(b) An appellate Court has all the powers of the Court of first instance in matters of reference to arbitration. 10 A. 8. C

I.—“The Court”—(Concluded).

(2) Appellate Court sending issue to first Court for evidence—Reference by first Court.

- (a) Where an appellate Court remits issues to the Court of first instance under S. 566, C.P.C., 1882, the latter Court has jurisdiction only to try the issues remitted, and *in functus officio* in other respects. It cannot therefore refer the case to arbitration, which the appellate Court alone has jurisdiction to do. 7 A. 523=A.W.N. (1885) 139; 22 W.R. 207. D
- (b) When the District Judge has remitted issues under S. 566 of Act XIV of 1882 to the Court of the Assistant Collector, the latter has no authority to allow the dispute to be arbitrated. A.W.N. (1906), 221. E

(3) Reference by Court without jurisdiction—Acquiescence of parties.

Subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference, if it was made by the Court without jurisdiction. 6 A.L.J. 351=1 Ind. Cas. 354. F

2.—“Shall, by order, refer to the arbitrator.”

(1) Order of reference—Necessity for.

An order of reference is necessary. 67 P.R. 1886. G

(2) Legality of award without order of reference.

An award is not legal, in the absence of an order of reference as is contemplated by the Code. 35 P.R. 1884. H

(3) Second reference on the same submission.

Where an award is set aside, a Court has no authority to make a —. A.W.N. (1908), 228=5 A.L.J. 658. I

(4) Order of reference without written application by the parties.

Where there is a desire on the part of the parties to a suit that a reference to arbitration should be made, the mere absence of a written application by them for such reference will not invalidate an order of reference to arbitration made by the Court. 23 B. 629; 4 A.L.J. 691=A.W.N. (1907) 273=80 A. 32. J

(5) Order for payment of expenses of arbitrators, legality of.

(a) A Court has no jurisdiction to order deposit of money for the payment of remuneration, or direct its payment to the arbitrators. 94 P.R. 1894. K

(b) Nor can it hold back a reference until payment of such money. 11 P.R. 1886. L

(6) Arbitrator's lien.

In the absence of any provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges. 22 P.R. 1899. M

(7) Power of arbitrators to apply to Court for confirmation of order of their fees.

There is no provision of law which authorises arbitrators to apply to the Court for confirmation of their order which makes the hearing of a reference conditional upon payment of their fees. 6 C. 809=8 C.L.R. 439. N

3.—“Matter in difference....required to be determined.”(1) **Matter to be stated in order of reference.**

All the points referred to arbitration must be stated in the order of reference.

10 W.R. 398.

O

(2) **Suit under Religious Endowment Act.**

In a suit under the Religious Endowments Act, a Court cannot refer the whole suit to arbitration, but may refer certain issues for decision by the arbitrators. 26 M. 361.

P

4.—“Shall fix time....in the order.”(1) **Court should fix time for making award.**

(a) It is necessary that a time should be fixed in the order of reference for the making of the award. 10 W.R. 206=1 B.L.R.S.N. 18 ; 6 M.I.A. 134 ; 18 A. 300 (P.C.)=18 I.A. 55 ; 30 A. 169.

Q

(b) The rule laid down in this section that a Court directing an arbitration by its order of reference shall fix a time for the delivery of the award, should be regarded as not merely directory but as mandatory and imperative. 18 I.A. 55=18 A. 300 (P.C.) overruling 10 A. 137.

R

(2) **Date for making award should not be left to the discretion of arbitrator.**

When a case is referred to arbitration, the Court should itself fix a date for making the award, and where the award is not completed within the time fixed, the Court itself, should, in extending the time, fix a particular date for the making of the award, and not leave it to the direction of the arbitrator to enlarge the time for himself. 9 Ind. Cas. 241.

S

(3-a) **Order of reference authorising arbitrator to extend time made by consent of parties.**

Where an order of reference to an arbitrator under Sch. II of the Code of 1908 fixed three months' time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order :

Held, that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired. 19 C.W.N. 165.

T

(3) **Order of reference fixing no time—Effect.**

(a) An omission in the order of reference to fix a date for the delivery of the award is not a mere irregularity, but is a defect fatal to the order of reference and to all subsequent proceedings founded thereon. A.W.N. (1908), 59=5 A.L.J. 144=30 A. 22. But see 18 M. 22.

U

(b) Where an award is made without the submission of all the parties, and without fixing the time for the making of the award, and a decree is made in accordance with it, an appeal is not thereby barred. 6 A.L.J. 333=1 Ind. Cas. 146.

V

(c) In 7 N.W.P.H.C.R. 361, it was held that the omission to fix a time in the order of reference for the delivery of the award does not vitiate the award if the parties permit the reference to proceed without making any objection until the award has been delivered.

W

4.—“ Shall fix time....in the order ”—(Concluded).

(4) Award to be made within time fixed.

The validity of an award depends upon the making of it within the period allowed, and it is immaterial on what date it is filed in Court. 27 A. 459=2 A.L.J. 201=A.W.N. (1905), 47; 26 A. 105. X

(5) Award made after time fixed—Validity.

(a) An award made after the expiry of the time fixed by the Court is void *ab initio*. It cannot be validated by an acceptance thereof by the Court after the expiry of the time, nor by an order made by the Court, for extension of time, after the making of the award. 2 N.L.R. 81. Y

(b) An appeal lies from a decree on an award not made within time fixed. 8 A. 548=A.W.N. (1896) 179. Z

(6) Objection as to time of delivery of award taken in appeal.

An objection that an award was made beyond the time allowed could be taken in the appellate Court, in the absence of proof that, in the Court of first instance, the party was aware of the defect or that he had consented to the extension of time. A.W.N. (1896) 179. A

5.—“ Court shall not....deal with such matter.”

(1) Effect of a reference.

(a) An agreement to refer to arbitration matters in dispute between the parties to a pending suit, ousts the jurisdiction of the Court to proceed with such suit. 27 A. 53=A.W.N. (1904) 160. B

(b) A Court is not competent to dispose of a case referred to arbitration, 80 P.R. 1879; but may proceed with the suit if it is apparent that the reference will be fruitless. 24 P.R. 1875. C

(2) After reference, Court cannot hear the suit without superseding reference.

Where after a reference is made the parties agree that the matters in dispute should be referred to a third party who should send his opinion to the arbitrators so that the latter might submit to the Court an award in accordance with that opinion, the agreement cannot possibly have the effect of superseding the appointment of arbitrators by the Court, and the Court cannot proceed to hear the suit without itself making, either under Ss. 5 and 6, an order superseding the reference. 24 A. 312=A.W.N. (1902) 72. D

(3) Withdrawal of suit after reference.

Where a suit has been referred to arbitration, the Court has no jurisdiction to permit the plaintiff to withdraw the suit with liberty to bring a fresh one. 9 A. 168=A.W.N. (1887) 13=7 C.W.N. 180. But see, also, 1 A.L.J. 257, *infra*. E

(4) Effect of withdrawal of suit after reference.

Where an order of reference to arbitration was made by Court, but before the date fixed for the delivery of award, the plaintiff withdrew his suit with leave to bring a fresh suit, it was held that the plaintiff was competent to bring a fresh suit. 1 A.L.J. 257. F

(5) Supersession of reference.

It is not competent to a Court to supersede a reference, in the absence of the arbitrator declining to act. 4 A.L.J. 691=A.W.N. (1907), 278. G

5.—“Court shall not....deal with such matter”—(Concluded).

(6) Dismissal for default after reference.

A suit referred to arbitration cannot be dismissed for default of appearance. 10
P.R. 1899. H

(7) Appointment of new arbitrator.

(a) After a reference has been made, the Court is not competent to revoke the authority of the arbitrator and appoint a new arbitrator except as provided in S. 5. 10 B. 381. I

(b) The enactment of the second paragraph of this section has the effect of rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary. 10 B. 381. J

Where reference is to two or more, or—
der to provide for arbitrators, provision shall be made in the order for a difference of opinion. 4. (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion¹ among the arbitrators—

- (a) by the appointment of an umpire²; or
- (b) ³ by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire⁴; or
- (d) otherwise as may be agreed between the parties, or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

(NOTES).

Old Act.

This rule corresponds to S. 509 of Act XIV of 1882.

1.—“Provision shall be made....for a difference of opinion.”

(1) Order of reference should provide for difference of opinion.

When a suit is referred to arbitration the order of reference should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority. 10 W.R. 399=2 B.L.R.S.N. xiv. K

(2) No provision for difference of opinion—Effect.

(a) An award is not a nullity, merely because no provision has been made in the order of reference for difference of opinion. 8 C.L.J. 475. L

(b) An award must be unanimous in the absence of provision for a difference of opinion. U.B.R. (1902), June 1; 12 C.P.L.R. 112. M

(c) In such a case, the award must be made and signed by all the arbitrators. 19 W.R. 47; 22 W.R. 129; 57 P.R. 1879; *Per Mathew, J. in United Kingdom Mutual Steamship Assurance Association v. Houston & Co.*, (1896) 1 Q.B. 567. N

1.—“*Provision shall be made....for a difference of opinion*”—(Concluded).

(d) The mere absence of a clause in the order of reference providing for a difference of opinion between the arbitrators cannot vitiate the award, where there is no such difference of opinion. 17 P.R. 130. O

(e) But if there is a difference of opinion among the arbitrators and the order makes no provision for such difference the award is liable to be set aside. 4 W.R. 4; But see 8 W.R. 171. P

(3) *Remission to arbitrators to provide for difference of opinion.*

A case having been referred to arbitration without provision being made for a difference of opinion, and the arbitrators having given differing awards, the Court of first instance tried the case anew, and dismissed the suit. This decision was confirmed on appeal. In special appeal, the plaintiff asked that the case might be sent back to the arbitrators with a provision for a difference of opinion, and that they might submit their award a second time. Held that it was too late at this stage to allow such a course. 14 W.R. 150. Q

(4) *Evidence as to provision in case of difference of opinion.*

Where a reference to arbitration did not contain any provision that the decision of the majority should prevail, oral evidence was admissible to prove that there was such a stipulation. U.A.R. (1897—1901), p. 5. R

(5) *Court need not adopt award not unanimous.*

Where an award is not made by all the arbitrators, a Court is not bound to adopt it. S.D. 2 of 1886 (O.C.). S

(6) *Parties bound only by unanimous award.*

(a) In the absence of a provision in the agreement to refer to arbitration, to the effect that the award of the majority should prevail, the parties would be bound only by the unanimous award of the arbitrators. 57 P.R. 1879. T

(b) Where the agreement of reference to arbitration gave the names of three persons, two of whom were described as *panches* and the 3rd as a *sarpanch*, and provided that whatever decision was arrived at by the *panches* and *sarpanch* would be binding on the parties, held, that the award made by the two arbitrators alone, without the co-operation of the *sarpanch* was invalid. 16 O.C. 94=17 Ind. Cas. 320. U

(c) The word *sarpanch* might indicate either an umpire or referee in case of difference of opinion among the arbitrators or might imply a chief or head arbitrator. The mere use of the word *sarpanch* does not necessarily imply that he is only to act in case of a difference of opinion. (*Ibid.*) V

(7) *Partial disagreement among arbitrators, effect of.*

An award as a whole is not nullified by a partial disagreement of the arbitrators. 2 W.R. 82. W

(8) *Appeal.*

Where a reference to arbitration provided that, in case of difference of opinion among the arbitrators, the Court itself might decide the case, the decision of the Court on the happening of such difference was appealable. 96 P.R. 1868. X

2.—“By the appointment of an umpire.”

(1) No provision for difference—Power of Court to appoint umpire.

Where an agreement to refer did not make any provision for a difference of opinion among the arbitrators, the reference became fruitless on a difference occurring among them, and the Court had no power to appoint an umpire without the consent of the parties. 191 P.R. 1882. Y

(2) Umpire—When his opinion prevails.

Where there was provision for the appointment of an umpire in case of difference of opinion among the arbitrators, the opinion of the umpire prevailed on the happening of difference among the arbitrators. 46 P.R. 1889. Z

3.—“Clause (b).”

Agreement to be bound by opinion of majority—Omission to record the fact in the order of reference.

Where the parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the Court to record the fact in the order of reference does not invalidate the reference to arbitration. 28 Ind. Cas. 842. A

4.—“By empowering the arbitrators to appoint an umpire.”

(1) Delegation of powers—Arbitrator—Umpire.

(a) Neither an arbitrator nor an umpire can delegate his powers. U.B.R. (1897—1901), p. 8; 17 E. 129; 7 W.R. 269. B

(b) A deputy or gumastah cannot act as an arbitrator on behalf of another. Old S.C. 11 (O.C.). C

(c) But the performance of acts of a ministerial character may be done by another. 87 P.R. 1902. D

(2) Award by umpire without consulting the arbitrators and differing from them.

In a suit for redemption of a *lekhā mukhi* mortgage, both parties agreed to refer to arbitration the question as to the amount payable on redemption. The reference provided that each side should appoint one arbitrator and that, in case of disagreement, the Court should appoint an umpire whose decision would be accepted. The words “*ba kasvalrai*” were cut out from the agreement to refer. Held that, as the arbitrators disagreed in their award, the umpire was entitled to settle the matter in any way he thought proper without conferring with the arbitrators. 55 P.R. 1915=167 P.W.R. 1915=80 Ind. Cas. 87. E

5. (1) In any of the following cases, namely :—

Power of Court to appoint arbitrator in certain cases. (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator ¹, or the person appointed refuses to accept the office of arbitrator, ² or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act ³ or becomes incapable of acting, ⁴ or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(a) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator⁵ or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice,⁶ and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire⁷ or make an order superseding the arbitration,⁸ and in such case shall proceed with the suit.

(NOTES).

(1) Old Act.

This rule corresponds to Ss. 510, 511, 507, 2nd para. of Act XIV of 1882. F

(2) Analogous law.

Compare (i) Ss. 8 and 9 of the Indian Arbitration Act.

(ii) Ss. 130, 131 of the Punjab Land Revenue Act XVII of 1897. G

(3) Scope of the rule.

This rule applies to cases, in which an arbitrator has not merely been nominated, but has also consented to act in the arbitration, and subsequently dies or refuses to act or becomes incapable of acting. This section presupposes the existence of a valid reference. 6 A.L.J. 851=1 Ind. Cas. 354; reversing on appeal, A.W.N. (1908) 159; 18 C. 324; 88 P.L.R. 1901; 6 M. 414; 17 M. 498; 110 P.R. 1900; *Ringland v. Lownder*, 15 C. B.N.S. 173. H

I.—“Where the parties cannot agree....to the appointment of arbitrator.”

Refusal to nominate arbitrator, effect of.

A refusal on the part of a party to nominate an arbitrator in the place of one, who refused to act, did not amount to a withdrawal from the agreement to proceed to arbitration. 1 Agra Rep. A.C. 109. I

2.—“Refuses to accept the office of arbitrator.”

(1) Refusal of arbitrator to accept nomination—Appointment of new arbitrator by Court.

The Court has power, under this rule to appoint a new arbitrator in the place of another, when that other refuses to accept nomination, as refusal to accept nomination clearly signifies refusal to act. 2 M.W.N. (1911), 182=10 M. L.T. 173 (P.C.). J

(2) Arbitrator cannot be compelled to make award.

(a) One of the most essential principles of the law of arbitration is that the adjudication of disputes by arbitrators should be the result of the free consent of the arbitrator, to undertake the duty assigned to him,

2.—“Refuses to accept the office of arbitrator”—(Concluded).

And the finality of an award is based entirely upon the principle that the arbitrators are Judges chosen by the parties themselves, and that such Judges are willing to settle the disputes referred to them. 7 A. 20=A.W.N. (1884) 212. K

(b) So when arbitrators refuse to act, but subsequently make an award in obedience to an order of the Court directing them to proceed, their proceedings are null and void. 7 A. 20. L & M

(3) Withdrawal of resignation of office before acceptance—Effect.

(a) An arbitrator can retract his resignation before it is accepted. 15 W.R. 38; 23 W.R. 429. N

(b) Such resignation and withdrawal does not divest him of his character as such. 10 A. 187=A.W.N. (1888) 28. O

3.—“Refuses or neglects to act.”

Umpire agreed upon by parties refusing to act—Power of Court to appoint a new umpire.

Where a suit was referred to two arbitrators, and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the Court had no jurisdiction to appoint an umpire in his place, if the parties did not consent to such appointment and that the reference to arbitration was invalid. 6 A.L.J. 351=1 Ind. Cas. 354. P

4.—“Becomes incapable of acting.”

Arbitrator becoming incapable of acting—Appointment of new arbitrator—Objection to applicability of section not taken in lower Court.

On an arbitrator becoming incapable of acting, the Court ordered a new arbitrator to be appointed in his place. On the award being delivered, objections were preferred by the plaintiff which were disallowed, and a decree in accordance with the award was passed. It was not objected that this rule, under which the lower Court acted, was not applicable to the case. The plaintiff contended that the decree was wrong and must be set aside on appeal or at any rate on revision. Held, that the contention was not valid. It was too late to raise the objection that this rule was not applicable to the case, that no appeal lay and that the Court would not exercise revisional jurisdiction in the case even if the revision lay. 27 P.L.E. 1910=8 Ind. Cas. 222=144 P.W.R. 1910. Q

*5.—“To appoint an arbitrator.”**(1) When party cannot apply to appoint arbitrator.*

Where a party to a suit has agreed to an arbitration and has selected an arbitrator, he cannot ask the Court to appoint another arbitrator. A.W.N. (1906), 51=3 A.L.J. 185. R

(2) Appointment of second arbitrator without discharging first—Award, if valid.

If another arbitrator is appointed without formally discharging the first arbitrator, the validity of the award of the second arbitrator cannot be questioned on the ground that the arbitrator was appointed without jurisdiction. 28 Ind. Cas. 842. S

6.—“On application by the party who gave the notice.”

(1) Consent of all parties for appointment not necessary.

An order under this section need not be passed with the consent of all the parties to the suit. 6 C.L.R. 1. S-1

(2) Refusal of party whose arbitrator declined to act to suggest another—Power of Court to appoint new arbitrator.

Parties to an administration suit entered into an agreement or compromise, which went beyond the actual matter of the suit between them, and the Court, under S. 375, O.P.C., 1882, made a decree in terms of the compromise, which provided that all points between the parties therein stated should be settled by arbitration of two arbitrators therein named. One of the arbitrators nominated by the respondents refused to accept his nomination. The Court, then, on the application of the respondents, who refused to appoint another arbitrator on their behalf, took the matter into its own hands under the latter part of this rule and adjudicated thereon. Held, that the decree under S. 375 of the Code was a final decree ordering the agreement and compromise of the parties to be carried into effect, and the Court had discharged itself of the *lis* between the parties; that there was, therefore, no suit pending, with which the Court could proceed under this rule. Held further that the agreement entered upon was something different from and went much beyond the suit, and all that the Court could do was to keep the machinery of arbitration going; that the Court had power to appoint another arbitrator and was in no way precluded from making that appointment by the fact that the party, whose arbitrator had declined to accept nomination, refused to assist the Court by suggesting another name; and that parties who agreed to set up a tribunal of arbitration were not bound to submit the case referred to another tribunal. 2 M.W.N. 1911, 132=10 M.L.T. 173 (P.C.). T

7.—“Appoint an arbitrator or umpire.”

(1) Court to ascertain willingness of proposed arbitrator.

Before ascertaining that a person is willing to act as an arbitrator, he should not be nominated as such. W.R. (1864), p. 338. U

In order to perfect the appointment of an arbitrator, acceptance of the office is necessary. 6 A.L.J. 351=1 Ind. Cas. 354. Y

(2) Power of Court on refusal of arbitrator.

(a) A Court has the sole power to nominate fresh arbitrators in the place of those that refuse to act. W.R. (1864), p. 338. W

(b) Where one of the arbitrators refused to act and withdrew from the arbitration, the Court was bound to appoint a new arbitrator or supersede the arbitration and proceed with the suit. 7 A. 528=5 A.W.N. 139; 5 A.W.N. 60. See *contra*, 110 P.R. 1900. X

(3) When Court cannot appoint fresh arbitrators.

A Court cannot appoint arbitrators after the dismissal of a suit and before the grant of new trial. 19 P.R. 1869. Y

(4) Power of Court to appoint new arbitrators.

(i) ARBITRATOR APPOINTED WITHOUT CONSENT—REFUSAL TO ACT.

(a) Where a Court referred a case to arbitrators named by the parties without ascertaining whether the arbitrators would act or not, and they

7.—“*Appoint an arbitrator or umpire*”—(Concluded).

subsequently decline to act, it has no power to appoint new arbitrators, when one of the parties object to the substitution of the new arbitrators. 6 M. 414. Z

- (b) The Court has no power under this section to appoint a new arbitrator in the place of another who has refused to accept his appointment. 110 P.R. 1900; 17 M. 498; 18 C. 324. A

(ii) REFUSAL AFTER ACCEPTANCE.

Under this section, the Court has power to appoint a new arbitrator only in cases where a person has signified his assent to take upon himself the duty of an arbitrator, and after so signifying his assent, dies or refuses or becomes incapable to act, or leaves British India, etc. 18 C. 324; 88 P.L.R. 1901. B

(4-a) Non-submission of award within time fixed by Court.

Where an arbitrator does not submit his award within the time fixed for filing it, his authority to submit the award lapses and it may be held that he has refused or neglected to act within the meaning of Sch. II, para. 5, cl. (b), sub-cl. (ii) of the Civ. Pro. Code. 23 Ind. Cas. 842. B-1

(5) Refusal by one arbitrator to act—Award by remaining arbitrators.

(a) When one of the arbitrators refuses to act the only course open to the Court is to appoint a new arbitrator, or supersede the arbitration altogether and proceed with the case. An award passed by the remaining arbitrators would be invalid, and the Court cannot pass a decree in accordance therewith. 7 A. 523=5 A.W.N. 139. See 12 M. 118. C

(b) This rule implies that in the absence of one of the arbitrators, the others cannot act. 12 M. 118. D

(6) Second arbitration, necessity for.

A Court need not consider a second arbitration, when it determines to go on with a case after the first arbitration. 4 C.P.L.R. 105. E

(7) Selection of umpire.

The Court should select an umpire from among the persons named by the parties in their submission to arbitration. 7 M.H.C.R. 72. See, also, 17 C. 200. F

8.—“*Make an order superseding the arbitration.*”**(1) When Court may or should supersede reference.**

(a) On one of the arbitrators becoming disabled to act, the Court may supersede the reference and decide the case itself. 66 P.R. 1870. G

(b) Where the arbitrators failed to submit an award within the time fixed by the Court, it was necessary that the Court should pass an order superseding the reference to arbitration. 24 A. 812. H

(2) When Court cannot supersede reference.

(a) A Court cannot supersede a reference to arbitration on the mere allegation by one of the parties, that the umpire was tampered with by the other party. 28 P.R. 1874. I

(b) Where a Judge reduced to writing an oral application by the parties and then made the reference, it was not competent for him to supersede reference, in the absence of the arbitrator declining to act. 4 A.L.J. 691=A.W.N. (1907) 279. J

8.—“*Make an order superseding the arbitration*”—(Concluded).

(3) Supersession of reference, effect of.

Withdrawal by the Court of a reference to arbitration does not bar a suit in respect of the same matter. 87 P.R. 1876. K

(4) Grounds for superseding a reference to arbitration.

The intention of the second Schedule to the Code of Civil Procedure is that, when once a reference to arbitration has been made under the orders of the Court, that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under para 15, after the award has been received. 86 A. 354=12 A.L.J. 529=23 Ind. Cas. 758. L

(5) Interference by Court with an arbitration proceeding pending under its orders.

(a) It is unsound on general principles to invoke the inherent jurisdiction of a Civil Court in a matter for which provision is made in the Code itself. A Court has no inherent jurisdiction under S. 151 of the Code to supersede an arbitration proceeding during its pendency, and the High Court can interfere in revision when the inherent jurisdiction of a Court is exercised wrongly and with material irregularity. (*Ibid.*) L-1

(b) The “inherent jurisdiction” of the Court, if it can be called into play at all in this fashion while the arbitration is pending, should be, “cautiously and sparingly exercised”, and only when it is obvious that the ends of justice would not be met by requiring the dissatisfied party to wait and see what the award might be and then to assail it on the ground of corruption or misconduct, if satisfied that such allegations can be made out. An application to a Court to interfere with an arbitration proceeding pending under its orders should not at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken (*Ibid.*). L-2

Powers of arbitrator-
or umpire ap-
pointed under para-
graph 4 or 5.

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

(NOTES).

Old Act.

This rule corresponds to S. 512 of Act XIV of 1882.

7. (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine ¹, as the Court may issue in suits tried before it.

Summoning wit-
nesses and default.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, ² penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

(NOTES).

(1) Old Act.

This rule corresponds to S. 513 of Act XIV of 1882. M

(2) Analogous Law.

Compare S. 182 of the Punjab Land Revenue Act XVII of 1897. N

1.—“The Court shall issue....to examine.”

(1) Examination of witness by commission.

When a case is referred to arbitration, it is competent to the Court to issue under this rule, a commission for the examination of witness. 7 Bom. L.R. 560. O

(2) Arbitrator not bound by technical rules.

As an arbitrator is appointed to give an equitable relief, he is not bound by the technical rules of Court. 1 W.R. 12. P

(3) Nature of evidence to be admitted by arbitrators.

(a) The arbitrators should take only such legal evidence as may be necessary to decide the matter referred to them. 2 B.L.R. App. 25. Q

(b) An arbitrator cannot import into his proceedings admissions made and evidence taken in a former proceeding. 24 W.R. 81. R

(4) Examination of arbitrator as a witness.

The arbitrator cannot be examined as a witness as to the grounds of his decision, but there is no objection to his being examined as a witness to prove any admission which may have been made before him, in the course of the arbitration and which might be material evidence. 17 W.R. 516. S

2.—“Persons....shall be subject to the like disadvantages.”(1) Arbitrator may proceed *ex parte*.

In the absence of the defendant, an arbitrator may proceed *ex parte*. S.D.N.W. 1866, p. 88. T

(2) Arbitrator not to be punished for refusal to attend.

Arbitrators cannot be punished for refusing to attend Court. 2 P.R. 1871. U

8. Where the arbitrators or the umpire cannot complete the award¹

Extension of time within the period specified in the order, the Court for making award, may, if it thinks fit, either allow further time,² and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration,³ and in such case shall proceed with the suit.

(NOTES).

(1) Old Act.

This rule corresponds to S. 514 of Act XIV of 1882. V

(2) Analogous Law.

Compare S. 12 of the Indian Arbitration Act. W

I.—“ Cannot complete the award.”

- (1) Making and not delivery of award within time is essential.

Delivery of the award within the time fixed is not essential; it is sufficient, if the award is made and signed by the arbitrators before that time. 26 A. 105 ; 27 A. 459 = 2 A.L.J. 201 = A.W.N. (1905) 47 ; 8 C.W.N. 916 ; 89 P.R. 1907 ; 22 M. 22 ; 18 B. 119. But see 8.A. 543 = 6 A.W.N. 179.

N.B.—See notes under rule 10 on this point.

X.

- (2) Award made in time but filed after the time fixed.

Where the Court granted time till the 28th of February 1914 for “ filing ” the award, and the arbitrators made an award in the Hindi language on that date, and also signed the same, but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following :

Held, that the word “ filing ” in the Court’s order was a clerical error and since the Hindi award was “ made ” within the time fixed by the Court, it did not matter that the award rendered into English was prepared and filed two days later; the requirements of the law had been satisfied and the award was a good one. 18 C.W.N. 1325.

X-1

2.—“ Court may....allow further time.”

- (1) Power of Court to extend time.

The Court has power to extend the period within which an umpire may give in his decision, just as it may in the case of an arbitrator. 4 M. 311.

Y

- (2) Discretion of Court to enlarge time for delivery of award.

Under this rule, the Court may, in its discretion, enlarge the period for the delivery of the award without the consent of the parties and even if they oppose the enlargement, there being no provision in this rule that enlargement shall be granted by consent. 2 W.R. 297.

Z.

- (3) Enlargement of time after expiry of time originally fixed.

(a) Under this section, the Court, of its own motion or on the application of the parties, may extend the time for making the award, even after the time fixed therefor has expired. 10 A. 137 = 8 A.W.N. 28 ; 11 M. 85 ; 15 M. 384.

A

(b) But in 2 N.L.R. 81, the Court doubting the soundness of the view of the Allahabad High Court in 10 A. 137 observed :—“ But it may be assumed that an order of extension having retrospective effect can be passed after the original period has expired. The exercise of the power must nevertheless be limited by what is contained in S. 514. That section allows extension for one reason and one purpose only. The reason is that the arbitrators have been unable to complete the award within the original period. The purpose is that the award may be completed within the extended period. It therefore follows that the moment the award has been completed, this section ceases to have any application. There is no warrant for introducing into its plain provisions something which is not expressly or by reasonable implication to be found there, namely, a power to extend time so as to validate a completed award which was not made within the period allowed by the Court. This would be in direct conflict with the last paragraph of S. 521.”

B.

2.—“Court may.....allow further time”—(Concluded).

(c) *Quere* :—Whether the case in 88 C. 522 had been rightly decided, having regard to the change in the law made by the wordings of S. 148 and Sch. II, cl. 8 and 15 of the Code of Civil Procedure (1908), which would seem to give the Court discretion to extend the time even after the original time for making the award has expired. 18 C.W.N. 1825. G

(d) Whether, having regard to the above changes in the law, the decision of the Privy Council in *Rajah Har Narain v. Bhagwant*, 13 A. 300 is of the same binding authority as before. (*Ibid.*) O-1

(3-a) Arbitrator after time originally fixed if *functus officio*.

But the arbitrator can only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time *functus officio* and had no further jurisdiction in the matter. As in this case the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator. 19 C.W.N. 165. G-2

(4) Court can't extend time after delivery of award.

Under this rule, the Court has power to extend the time for the delivery of the award only so long as the award is not completed. The Court is not competent to exercise that power after the award is made and delivered. 19 A. 300 (P.C.); 15 M. 384. G-3

(5) Order granting extension of time to be in writing.

The application for extension of time and the order of the Court thereon should be in writing. 3 M. 59. D

(6) Order for enlargement of time should be express.

Extension of time for the delivery of an award must be express and cannot be implied by the passing of a decree in accordance with the award. 8 A. 548=6 A.W.N. 179; 13 A. 300 (P.C.); 10 A. 187=8 A.W.N. 82. E

3.—“May make an order superseding the arbitration.”

(1) Neglect of arbitrators to submit award—Power of Court.

Where the arbitrators neglect to submit an award within the time fixed, the Court may either appoint new arbitrators or make an order superseding the arbitration. 24 A. 312. F

(2) No order superseding arbitration—Jurisdiction of Court.

A dispute was referred to arbitration appointing two arbitrators and an umpire. The notices issued to the umpire and one of the arbitrators were returned unserved. The Court, while issuing notices to the arbitrators, had passed the order that, if no award was filed within the period fixed, the parties were to be in attendance with their witnesses prepared to proceed with the case. No award was filed within the prescribed period, and the Subordinate Judge dismissed the suit. Held, whether the order passed by the Subordinate Judge amounted to a dismissal for default or a decision against the plaintiff on the merits, it was made without jurisdiction, having been passed in the absence of a proper order superseding the arbitration, before the Court proceeded to dispose of the case. 10 A.L.J. 23 = 16 Ind. Cas. 177. G

3.—“*May make an order superseding the arbitration*”—(Concluded).

(2-a) No formal order of supercession—Proceeding after time with suit.

Where no order was made extending the time for return of the award, and the suit was proceeded with, it must be taken that the arbitration was in effect superseded, even though there is no formal order to that effect. 14 M.L.T. 388=(1913) M.W.N. 863. G-1

(3) Order superseding award cannot be passed after completion of award.

An order, superseding the award under para. 8 of the second schedule to the Code of Civil Procedure, cannot be passed where the award has already been made and completed, or in other words, delivered within the time fixed, though it may reach the Court afterwards. 16 O.C. 94=17 Ind. Cas. 320. H

(3-a) Application to correct an award—Limitation.

No specific provision is made in the Limitation Act for applications to correct an award. 24 M.L.J. 483. H-1

(4) Procedure adopted in superseding arbitration not prescribed by law—Revision.

When the Lower Court, in superseding an arbitration, has adopted procedure not prescribed by the law and there is no other available remedy, the Chief Court is competent to interfere in exercise of its revisional powers. 251 P.W.R. 1912=125 P.R. 1912. See, also, 87 P.R. 1895. I

(5) Reference fallen through—Procedure.

Where a reference to arbitration fails through owing to non-submission of the award on the date fixed for submission, the course the Court should follow is to fix a date for the hearing of the suit, so as to enable the parties to appear and adduce evidence in support of their respective cases. Where this procedure was not followed, the High Court set aside the order of dismissal of the suit for default of appearance. 12 C.L.J. 624. J

(5-a) Agreement not to dispute award—Effect.

While the award was being rendered into English, the parties entered into a written agreement not to dispute the award, the plaintiff was precluded from questioning the award. The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under O. XXIII, r. 8. 18 C.W.N. 1925. J-1

(6) Arbitration not superseded—Appeal.

Under S. 104 (1) (a) of the Code of 1908, no appeal lies when the arbitration is not superseded under Sch. II, cl. 8 of the Code. 251 P.W.R. 1912=125 P.R. 1912. K

9. Where an umpire has been appointed, he may enter on the

Where umpire reference¹ in the place of the arbitrators,—
may arbitrate in lieu (a) if they have allowed the appointed time
of arbitrators. to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice
in writing stating that they cannot agree.

(NOTES).

Old Act.

This rule corresponds to S. 515 of Act XIV of 1882.

L

I.—“Umpire....may enter on the reference.”

(1) Extension of time for umpire to make award.

A Court has power to extend the period within which an umpire may give his decision, just as it may in the case of an arbitrator. 4 M. 311. M

(2) Umpire not agreeing with any arbitrator.

An award of the umpire not agreeing with that of any set of the arbitrators, where such agreement was the condition of reference, was not legal. 7 A.W.N. 197. N

10. Where an award¹ in a suit has been made², the persons who made it shall sign it³ and cause it to be filed⁴ in Court, together with any depositions and documents⁵ which have been taken and proved before them; and notice of the filing shall be given⁶ to the parties.

(NOTES).

(1) Old Act.

This rule corresponds to S. 516 of Act XIV of 1882. O

(2) Analogous law.

Compare (i) S. 11 of the Indian Arbitration Act, (ii) S. 133 of the Punjab Land Revenue Act XVII of 1887. P

I.—“Award.”

(1) Nature of document forming award.

(a) An award should be a single instrument complete in itself, signed conjointly by the arbitrators and in the presence of each other. It should not consist of several papers bearing different dates. 12 W.R. 397=8 B.L.R. 130 (N) =8 B.L.R. 319 (n). Q

(b) No document other than that resolved upon by the arbitrators can be treated as an award. U.B.R. (1902-1903), Vol. II, Arbitration I. R

(2) Decision according to oath is no award.

Where a party agreed to be bound by the oath of the other party, a decision of the arbitrators in accordance with the oath was an award. 4 A. 283, But see 1 A. 535; 4 A. 302. S

(3) Settlement arrived at by parties on the advice of arbitrators.

A petition to the Court presented by the arbitrators, together with a document executed by the parties embodying the terms of a settlement arrived at by them on the advice of the arbitrators, is not an award. 79 P.R. 1877. T

2.—“Made.”

(1) Construction of “made.”

(a) The word “made” means that the mind of the arbitrators has been declared. 27 A. 459=2 A.L.J. 201=A.W.N. (1905) 47. U

(b) The word ‘made’ does not mean delivery because “making” and “delivery” indicate different stages. The word ‘made’ does not include the *filling* of the award. The validity of the award depends upon the making of it, and it is immaterial on what date it is filed. (*Ibid.*) 26 A. 105. V

2.—“*Made*”—(Concluded).

- (c) In 5 B.L.R. 357, Norman, J., observed as follows:—“No doubt where there are several arbitrators, the judicial act of making an award must be the act of all the arbitrators. They must all be present together and concur in that which is to stand as their joint judgment. But when the award is completed and the functions of the arbitrators as judges are at an end, it matters little through what channel the award is transmitted, or in other words by whom it is submitted to the Court. I think, therefore, that the reason of the thing as well as the change in the language shows that the completion and delivery of the award mentioned in Ss. 315 and 318 (Act VIII of 1869) is something different from the submission to the Court under S. 320.” W
- (d) An award made after the expiry of the time fixed by the Court is void ab initio. It cannot be invalidated by the acceptance thereof by the Court after the expiry of the time, nor by an order of the Court for extension of time made after the making of the award. 2 N.L.R. 81. X

3.—“*Persons who made it shall sign it.*”

- (1) Award not signed at the same time.

(a) If the case has been regularly heard by all the arbitrators sitting together, and an award has been drawn up and signed by them, the mere omission of the arbitrators to sign the award at the same time and in each other's presence does not invalidate the award. 8 B.L.R. 128. Y

(b) If all the arbitrators agree to an award, they need not sign it in the presence of each other. 18 M. 22. Z

- (2) Signature of parties to award.

The signature of the parties in an award does not affect the character of the award. 6 C.P.L.R. 95=81 P.R. 1918=20 Ind. Cas. 868. A

- (2-a) Award not signed by parties—Validity.

An award even in the absence of the signatures of the parties, is binding on all who had agreed to make reference to arbitration. 32 Ind. Cas. 88. B

- (2-b) Award not signed by the minority.

When the parties have agreed to abide by the decision of the majority of the arbitrators, an award cannot be set aside on the ground that it has not been signed by the minority. 6 W.R. 95; 1 Patna L.J. 90. C

- (3) All arbitrators to be present at all meetings.

(a) The presence of all the arbitrators at all meetings, and above all, at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. 7 A. 529=5 A.W.N. 139; 1 O.C. 181. D

(b) In the absence of one of the arbitrators, the others cannot act. 12 M. 113. E

- (4) Arbitrators should act together.

All the arbitrators should act together in every stage of the proceedings. 8 W. R. 171; 6 W.R. 269. F

- (4-a) Each arbitrator must act personally.

On a reference to several arbitrators together, where there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office as if he were the sole arbitrator. 16 O.C. 94. G

- (5) Oral award.

(a) An oral award though undesirable is perfectly valid. 8 Bom. L.R. 691. H

3.—“Persons who made it shall sign it”—(Concluded).

- (b) Though an oral award may be given and a note or minute of it may be sufficient, still, if the arbitrators resolve that the award is to be put in the form of a document to be signed by them, nothing but such document can be treated as the award. U.B.R. (1892-1896) 276. I
- (c) In 6 B. 663, the High Court treated an oral award as the real award and held that the record of it was valid although it was signed by only four out of seven arbitrators. J

(5-a) Oral award, when can operate to transfer property.

An oral award can be as good and effective as a written award. But until an award, whether oral or written, has been made a rule of Court so as to give it the force of a Civil Court decree it cannot operate to transfer property. 17 O.C. 108=24 Ind. Cas. 542. K

(6) Power of arbitrator to determine question of limitation.

In the absence of express authority, a reference to arbitration in Upper Burma does not include an authority to dispose of a question of limitation. U.B.R. (1892-96), p. 9. L

(7) Objection on ground of limitation not to be raised after award.

An objection on the ground of limitation cannot be raised, where the matter in dispute had been referred to arbitrators and an award had been made by them. (1878) S.C. Part X, No. 18. M

4.—“Cause it to be filed.”**(1) Time for filing award.**

Where the date fixed for filing an award was a holiday, it could be filed on the following day. 78 P.R. 1899. N

(2) Validity of award not filed in Court.

An award written and signed before the date fixed, but not filed in Court before the expiry of that period, is valid. 89 P.R. 1907. O

(3) Necessity for publication of award.

It is necessary for the validity of an award that it should be published. 19 A.W.N. 39. P

(4) Publication of award, meaning.

By the term publication is meant, generally speaking a delivery, to some of the parties to the award; and probably a holding of it by the arbitrator after notice to the parties for the purpose of delivery might be held to effectuate the award. 19 A.W.N. 30. Q

(5) Refusal to file award.

The destruction of an award after presentation in Court is no ground for refusing to file it. 1 Sind L.R. 167. R

of arbitrators after filing award.

If arbitrators become *functus officio* after the award is made and filed. 9 C. 575. S

is not open to a dissentient arbitrator to come in afterwards and sign the award nor has the Court any power to allow him to so sign it. The award if so signed subsequently becomes illegal. 33 C. 498. T

5.—“Together with any depositions and documents.”

(1) Arbitrator to return records to Court.

An arbitrator should not permit the removal of documents entrusted to him and forming part of the record; 12 W.R. 397=8 B.L.R. 319, note; but should return the award and records direct to the Court. (*Ibid.*) The Court can compel him to deliver up the documents entrusted to him. 17 C. 882. U

(2) Delivery of award.

The arbitrators may deliver the award to a third party to be filed. 5 B.L.R. 357. V

(3) Delivery of proceedings and exhibits.

(a) Although an arbitrator may deliver an award to one of the parties, he ought not to hand over with it the proceedings, depositions and exhibits in the suit. 5 B.L.R. 357. W

(b) They must be delivered to the Court direct. 12 W.R. 397. X

(4) Lien of arbitrator on award.

(a) In the absence of an express promise by the parties to remunerate, an arbitrator has no remedy to recover his remuneration; he can only refuse to deliver his award until his charges are paid. 22 P.R. 1897. Y

(b) An order compelling him to produce the award will be interfered with in revision. (*Ibid.*) Z

6.—“Notice of the filing shall be given.”

(1) Omission to give notice of filing—Irrregularity.

The omission to give notice of the filing of an award under this rule is a material irregularity within the meaning of S. 115, C.P.O., 1908, which will vitiate a decree passed in terms of the award. 11 M. 144; 20 A. 474=18 A.W.N. 132; U.B.R. (1897-1901) 290. A

(1-a) Notice of submission necessary.

Under Art. 158, Limitation Act, the period of ten days is to be computed from the day on which the parties receive notice that the award has been submitted to and not from the date on which it is actually received by the Court. So where the award was submitted to the Court on 30th September, but the parties came to know of its submission on 11th October, the petition of objection to the award presented on 20th October is within time. 30 P.W.R. 1915=96 P.L.R. 1915=28 Ind. Cas. 127. B

(2) Notice for filing reconsidered award.

It is necessary that notice should be given to the parties, before filing an award in its final shape, after reconsideration by the arbitrators. 2 U.B.R. (1897-1901), 24. C

Miscellaneous.

(1) Suit to recover property discovered after award.

There is nothing to prevent a member of a family from suing for her share in the property, discovered after an award to belong to the family. S.J.L. B. 196. D

(2) Sale of claim under inchoate award.

An expectant claim under an inchoate award is not saleable in execution of a decree. 7 B.L.R. 186 (P.C.)=14 M.L.A. 40. E

(3) Dismissal of suit after award on ground of limitation.

A Court should not dismiss a suit on the ground of limitation, after reference to arbitration and delivery of the award. 17 A.W.N. 161. F

11. Upon any reference by an order of the Court, the arbitrator or
 Statement of spe- umpire may, with the leave of the Court, state the
 cial case 1 by arbit- award as to the whole or any part thereof in the
 trators or umpire. form of a special case for the opinion of the Court,
 and the Court shall deliver its opinion thereon, and shall order such
 opinion to be added to and to form part of the award.

(NOTES).

(1) Old Act.

This rule corresponds to S. 517 of Act XIV of 1882. See, also, S. 90 of the Code.

(2) Analogous Law.

Compare cl. (b) of S. 10 and cl. 3 of S. 11 of the Indian Arbitration Act. G

I.—“Statement of special case.”

(1) Arbitrators applying for Court's opinion on burden of proof.

Where the arbitrators applied to the Court for an expression of its opinion on the burden of proof in the case, and the conduct of the arbitrators in this particular case was not objected to in the Court of first instance, no appeal lay from a decree on the award of the arbitrators, merely because the Court gave its opinion on the question put in the special case. 55 P.R. 1889. H

(2) Application to file award—Time for filing objections.

Under Art. 158, Limitation Act, read with cl. 10 and 16 of the Second Schedule of the Civ. Pro. Code, 1908, no application to set aside an award could be admitted after the expiration of ten days from the date of filing award. The period of ten days cannot be computed from the date of service, upon the objecting party, of notice of filing the submission in Court. 8 S.L.R. 190=27 Ind. Cas. 371. I

(3) Court if can advise arbitrators.

There is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty. 11 P.W.R. 1916=28 P.R. 1916. J

Power to modify or correct award. 12. The Court may, by order, modify or correct an award ¹,

- (a) where it appears that a part of the award is upon a matter not referred to ² arbitration and such part can be separated ³ from the other part and does not affect the decision on the matter referred; or
- (b) where the award is imperfect in form, or contains any obvious error ⁴ which can be amended without affecting such decision; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

(NOTES).

(1) Old Act.

This rule corresponds to S. 518 of Act XIV of 1882.

K

(2) Analogous law.

Compare cl. (c) of S. 10 of the Indian Arbitration Act.

K-1

(3) Scope of the section.

Ss. 12 and 14 of the 2nd Schedule of the Civil Procedure Code refer to awards made on a reference under S. 3, and do not apply to an award made without the intervention of the Court. In the latter case, the Court has no power to amend or remit the award. 14 Ind. Cas. 978.

L

1.—“Court may....modify or correct an award.”

(1) Construction of award.

An award must be construed by its language, and not by the oral evidence of the arbitrators. 3 N.W.P. 117.

M

(2) Validity of award opposed to Hindu Law.

An award of proprietary rights cannot be questioned on the ground that the devolution of property is opposed to Hindu law. 14 C.P.L.R. 94.

N

(3) Devolution of property, if alterable by award.

It is not competent to an arbitrator to alter the course of legal devolution of property in a mode at variance with the ordinary principles of law governing the parties, in the absence of special custom prevailing in the family. 23 A. 388 (P.C.)=5 C.W.N. 585=28 I.A. 111.

O

2.—“Award....upon matter not referred to.”

Necessity for separate awards.

There should be separate awards in respect of matters referred to by the parties and those referred to by the Judge. 3 W.R. (Mis.) 27.

P

3.—“Where....such part can be separated.”

(1) Part in excess of authority separable.

Where an award consists of two separable parts and one of them only is an excess of authority, the other part of the award can be given effect to. 87 P.R. 1902 (P.C.).

Q

(2) Void portion separable.

Where the void portion of an award is separable and the remaining portion of it determines all material questions submitted, the valid portion of the award may be maintained. 18 P.R. 1892.

R

4.—“Where the award....contains any obvious error.”

Power of Court to amend and correct award for obvious error.

An issue whether a particular property was endowed property, and whether it was partible or not was referred to arbitrators for determination. The arbitrators decided that it was not endowed property but held that it should not be partitioned and must continue as endowed property; Held, that the award contained an obvious error, which the Court was competent to modify and correct under this rule. 2 Ind. Cas. 858.

S

13. The Court may also make such order as it thinks fit respecting

Order as to costs the costs of the arbitration where any question arises of arbitration.¹ respecting such costs and the award contains no sufficient provision concerning them.

(NOTES).

(1) Old Act.

This rule corresponds to S. 519 of Act XIV of 1882.

T

(2) Analogous law.

Compare S. 17 of the Indian Arbitration Act.

T.1

I.—“Order as to costs of arbitration.”

(1) When arbitrators can deal with question of costs.

The question of costs of the reference and award may be dealt with by the arbitrators, only when all the matters in difference between the parties have been referred to them. 1 B.L.R.O.C.J. 144; 91 P.R. 1888; 2 Ind. Jur. N.S. 12.

U

(2) Court's power to award costs where no award is made.

(a) Where no provision is made in the award or where no award has been made by an arbitrator appointed by Court, the Court has power to award costs of the arbitration, as, for instance, the arbitrator's fee as costs of a proceeding incident to a suit, under S. 35, Civ. Pro. Code, 1908. 6 S.L.R. 226; 19 Ind. Cas. 611.

V

(b) The power of Court to award the arbitrator's fees as costs is not limited to cases when an award has been made. 19 Ind. Cas. 611.

W

(3) Award silent as to costs.

In a suit filed in *forma pauperis*, the whole case was referred to arbitration. The award allowed about one-third of the claim but was silent as to costs. The Court, in passing decree in accordance with the terms of the award, awarded full costs to the plaintiff. Held, on appeal, that the order of the lower Court as to costs was wrong. The Chief Court ordered the parties to bear their own costs. 35 P.L.R. 1906.

X

(4) Unauthorised provision as to costs in award, effect of.

Where a submission to an arbitration does not leave the question of costs to the arbitrators, an award which makes provision therefor should not be filed in Court. 9 B. 82.

Y

(5) Court's power to vary arbitrator's order as to costs.

Where the award directs that each party should bear his costs, it is not in the power of the Court to vary this order by making an additional order that the plaintiff and the defendant should each pay half the amount of Court fees to Government. 15 P.R. 1880.

Z

(6) Scale of costs.

Where the order of reference gives the arbitrator full discretion over costs, the arbitrator alone can fix the scale of costs. Bourkes Rep. O.C. 7.

A

Where award or matter referred to arbitration may be remitted.

14. The Court may remit 1 the award or any matter referred to arbitration to the re-consideration of the same arbitrator² or umpire, upon such terms as it thinks fit.—

(a) Where the award has left undetermined any of the matters referred to³ arbitration, or where it determines any matter

not referred to ⁴ arbitration, unless such matter can be separated without affecting the determination of the matters referred;

- (b) where the award is so indefinite as to be incapable of execution ⁵;
- (c) where an objection to the legality of the award is apparent upon the face of it ⁶.

(NOTES).

(1) Old Act.

This rule corresponds to S. 520 of Act XIV of 1882.

B

(2) Analogous Law.

Compare S. 18 of the Indian Arbitration Act.

B-1

1.—“Court may remit.”

(1) Court cannot remit unnecessarily.

A Court should not remit an award for re-consideration unnecessarily. 14 W.R. 469.

G

2) Propriety of remission—Which Court to determine.

(a) The Court which accepts an award should determine the propriety of remitting it to the arbitrators for re-consideration. 64 P.R. 1870.

D

(b) The question whether the remission of an award was proper or not could be entertained in an appeal. 8 A. 636=1 A.W.N. 84; 22 M. 202.

E

(3) Refusal to remit award—Appeal.

(a) A refusal by Court to remit an award under rule 14 of Schedule II of the Civil Procedure Code is not appealable. 15 Ind. Cas. 578.

F

(b) Under para. 14 of Sch. II of the Civ. Pro. Code, a Court may remit an award to an arbitrator upon the ground that the award has left undetermined one of the matters referred, but if the Court, after considering the objection made upon this ground, refuses to remit the award to re-consideration, no appeal lies from such refusal. 23 Ind. Cas. 862.

G

(4) Remission of private award.

The Court has no power to remit an award, made without the intervention of Court, for re-consideration by the arbitrators. 27 A. 526.

H

2.—“To the re-consideration of the same arbitrator.”

Power of arbitrator to re-consider award after it is made.

On the objection of any party, the arbitrators can re-consider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one. 78 P.W.R. 1910=6 Ind. Cas. 963.

I

3.—“Where the award has left undetermined any of the matters referred to.”

(1) Remission for mistakes and omissions.

If the arbitrators commit mistakes or omissions such as cannot be amended, the Court should return the award for re-consideration. 7 W.B. 406; 2 A. 181; *Fuller v. Fenwick*, 16 L.J. C.P. 79.

J

3.—“Where the award has left undetermined any of the matters referred”—(Concluded).

(2) Decree passed without enquiring into objections to award—Remand.

Where a decree was passed on an award, without enquiring into the objection to the award on the ground of misconduct of the arbitrators, the suit was remanded for passing a fresh judgment after enquiring into the objection.
184 P.R. 1882. K

(3) Order rejecting objections to an award without adequate enquiry.

An order rejecting the objections to an award without adequate enquiry into them, apparently under the impression that these were not raised within time, is liable to be set aside on revision by the Chief Court, and the case is to be remanded for adjudicating them in a proper manner. 30 P.W.R. 1915=96 P.L.R. 1915=28 Ind. Cas. 427. L

(4) Award not finally determining matter referred for arbitration.

The partners in a money-lending firm referred their disputes and differences regarding certain items to arbitrators agreeing in writing to abide by their award if made by a certain date. The arbitrators made the award by the specified date and directed that, as the plaintiff purchased outstandings at a certain valuation, the defendant should be responsible for any error or omission in the accounts regarding those outstandings.

Held, that the award did not finally determine the questions referred for arbitration, as it exposed the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts, however unintentional it might be. 24 Ind. Cas. 132. M

(5) Withdrawal of question from arbitrator.

When the parties withdraw certain questions from the arbitrator they cannot complain of there being no decision on those questions. 14 A.L.J. 481. N

4.—“Where it determines any matter not referred to.”

Remission for deciding matters not referred to.

(a) Where an award embraces matters not referred to arbitration, the Court should remit it for re-consideration by the arbitrators. 60 P.R. 1896. O

(b) The Court is bound to refuse to file such an award. 29 M. 303. P

5.—“Where the award is so indefinite as to be incapable of execution.”

Power of arbitrator to ascertain points at issue.

Where a reference is made “of all matters in difference” in the suit and the issues are not definitely laid down, the arbitrator may ascertain the points at issue from the parties. 2 N.W.P.H.C.R. 150. Q

6.—“Objection to the legality.... apparent upon the face of it.”

(1) Remission of illegal and defective award.

An award illegal and defective on the face of it, must be remitted for re-consideration, 2 N.W.P. 150; and in the absence of such illegality or defect, a Court is not justified in remitting the award. 2 A. 118. R

(2) Remission for disregard of law or custom.

Open disregard by arbitrators of proved law or custom is a good ground for remitting the award. 12 P.R. 9. S

6.—“Objection to the legality.....apparent upon the face of it”—(Concluded).

(3) Remission for illegal set-off.

Where an award had allowed as a set-off, an item founded on a wagering transaction, the proper procedure for the Court was to remit the award for re-consideration by the arbitrators. 101 P.R. 1868. T

(4) Award of some arbitrators tendered as the award of all arbitrators.

An award purporting to be the act of a certain number of arbitrators, if tendered to be filed as the award of all the arbitrators, should be rejected. U.B.R. (1892-1896), 276. U

(5) Finding in award not based on any evidence.

An award is not defective simply because that a finding therein is not based on any evidence ; all that the Court has to see is the bona fides of the arbitrator. 18 P.W.R. 1914=114 P.L.R. 1914=28 Ind. Cas. 950. V

(6) Clerical error in award.

A mere clerical error in an award can be put right by a Court under the powers conferred on it by S. 151 of Civ. Pro. Code (1908). 18 P.W.R. 1914=114 P.L.R. 1914=28 Ind. Cas. 950. W

(7) Slips in award.

The Court is bound to correct any obvious mistakes or slips in an award in the same manner in which mistakes in deoxxes are corrected. (1918) M.W.N. 388=24 M.L.J. 488=18 M.L.T. 849=19 Ind. Cas. 496. X

Miscellaneous.

(1) Proof of objections to filing of award.

Objections urged against the filing of an award must be proved and not merely alleged. 28 B. 287. Y

(2) Waiver of condition in reference.

Before the disposal of a case by the arbitrators, the parties may waive a condition that the award shall deal with all the matters referred to arbitration. 21 C. 590=21 I.A. 47. Z

(3) Necessity for separate finding.

Where the whole matter in difference between the parties is referred to arbitration, a separate finding on each issue is not necessary. 22 M. 202. A

(4) Court not to decide in excess of award.

A Court cannot give something not allowed by an award. 5 C.L.R. 338. B

(5) Parties to join in agreement to abide by oath.

All the parties to a referred suit must join in an agreement to abide by the oath of a party thereto. 4 A. 302. C

(6) Parties to reference, if can object to the legality of the award.

Submission to an arbitration does not operate as waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. 21 C.L.J. 273=19 C.W.N. 948. D

15. (1) An award ¹ remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. ² Grounds for setting aside award. But no award shall be set aside ³ except on one of the following grounds,⁴ namely :—

(a) corruption or misconduct ⁵ of the arbitrator or umpire ;

- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed,⁶ or of wilfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.⁷

(2) Where an award becomes void⁸ or is set aside under clause (1), the Court shall make an order superseding the arbitration⁹ and in such case shall proceed with the suit.

(NOTES).

(1). Old Act.

This rule corresponds to S. 521 of Act XIV of 1882.

E

(1-a) Difference between this rule and S. 521 of Act XIV of 1882.

The difference between S. 521 of the old Code and para. 15 of Sch. 2 to the new Code is that, under the former, an award made after the time fixed by the Court for making it was a mere nullity and consequently the Court could *suo motu* treat it as non-existent, but according to the latter such an award is simply liable to be set aside upon an application by one or other of the parties. So if no such application is or can be made or if it is refused on some ground, the award becomes final, and no appeal lies from the decree based thereon. 44 P.W.R. 1916. F

(2) Analogous law.

Compare S. 14 of the Indian Arbitration Act. Compare S. 205 of the N.W.P. and Oudh Land Revenue Act, 1901. G

(3) Scope of the rule.

This rule does not deal with the question of jurisdiction but specifies the grounds upon which an award may be set aside. 30 C. 397 = 7 C.W.N. 545. H

I.—“Award.”

(1) Nature of document forming award.

See 12 W.R. 397; U.B.R. (1902—1903), Vol. II, Arbitration I, under r. 10 *supra*. I

(2) Decision in accordance with oath is no award.

See 4 A. 283; 4 A. 302 and 1 A. 535 under r. 10. J

(3) Settlement arrived at by parties on the advice of arbitrators.

See 79 P.R. 1877 under r. 10. K

2.—“Becomes void on failure....to reconsider it.”

(1) Arbitrator declining to reconsider award.

(a) Where the arbitrators or umpire decline or declines to reconsider an award remitted for reconsideration, the award becomes void, even in the absence of proof of corruption or misconduct. 7 W.R. 406; 3 W.R. 168. L

(b) Where an award is remitted to an arbitration for determination of matters left undetermined and the arbitrator refuses to reconsider and complete the award, the Court has no alternative but to ignore the incomplete award and try the case. 16 C. 806. M

2.—“Becomes void on failure....to reconsider it”—(Concluded).

(2) Arbitrator not acting as per directions in the order of remission.

An arbitrator to whom an award is remitted for reconsideration with an express injunction that a full enquiry is to be made and who does not take any evidence but makes his second award merely on the strength of a local inspection fails to reconsider it within the meaning of this section.
A.W.N. (1898) 45. N

3.—“No award shall be set aside.”

(1) Agreement not to raise any objection against award binding on the parties.

- (a) Where the parties have expressly agreed that the award was to be final and binding and that none of the parties would offer any ‘objection whatsoever’ to it, no objection either on the ground that the award was made after time or on any other basis which can be raised under this rule is entertainable. 44 P.W.R. 1916. O
- (b) It is competent for the parties to agree that the question of fraud or misconduct on the part of the arbitrator shall not be raised by either party. (*Ibid.*) P

(2) Application to set aside award.

- (a) An application to set aside an award falls within rule 15 of the 2nd Schedule of the Code of Civil Procedure and does not include proceedings under rules 12 and 14. (1918) M.W.N. 398=24 M.L.J. 483=18 M.L.T. 849. Q

- (b) Art. 158 of the Limitation Act does not apply where the award is on the face of it void; for the Court ought to take judicial notice of its patent invalidity, notwithstanding the fact that neither party has taken any objection thereto. *Lala v. Chandri Abdus Samad*, 16 O.C. 94=17 Ind. Cas. 320. R

(2-a) Effect of order setting aside award.

- So long as an order setting aside an award is in force, the award has no effect. 21 W.R. 261. S

(2-b) Time for application to set aside award.

- An application to set aside an award must be made within ten days from the time the award is received by the Court for the purpose of being filed, and not from the time when it is filed. 5 C.W.N. 818. T

(3) Application to set aside award presented after the prescribed period of limitation.

- Under S. 5 of the Limitation Act, the Court has no authority to receive an application to set aside an award after the time prescribed by Art. 158 of the Act. It is not competent to the Court to extend the time prescribed by that article. 17 Ind. Cas. 7=18 C.L.J. 35. U

(4) Order setting aside award when appealable.

- (a) When an appeal is finally preferred against a decree of a Court of first instance, which Court has, in the course of the suit, set aside an award of arbitrators on the ground of misconduct, the order setting the award aside can be traversed in the appeal against the whole decree, but it is not appealable as an interlocutory order. 106 P.W.R. 1912=138 P.L.R. 1912 =97 P.R. 1912=15 Ind. Cas. 62; 59 P.R. 1875; 72 P.R. 1881; 81 M. 845. But, see, 28 A. 408. V

3.—“No award shall be set aside”—(Continued).

(b) No appeal lies against an order setting aside an award. 28 A. 408=A.W.N. (1906), 64=3 A.L.J. 168; *contra*, if the order proceeded on ground not contemplated by this section. A.W.N. (1908), 242=5 A.L.J. 644=4 M.L.T. 400. W

(5) Appeal against order overruling objections to award.

(a) No appeal lies against an order overruling objections to an award on a reference through Court. 9 Ind. Cas. 385. X

(b) A reference to arbitration was made in a pending litigation through Court, and the arbitrator's award was challenged, under 2nd Schedule, Cl. 15 (1) (a), on the ground of misconduct of the arbitrator. After making an inquiry into the allegations of misconduct, the Court disallowed the objections and passed a decree in accordance with the award. *Held*, that no appeal lay from the order disallowing the objections or from the decree passed on the basis of the award. 16 Ind. Cas. 595. Y

(6) Appellate Court may restore an award set aside on insufficient grounds.

A Court of appeal has power to consider an order setting aside an award and to restore the award if it has been set aside on insufficient grounds. 4 P.W.R. 1918 (N.W.F.P.). Z

(7) Appeal on grounds of misconduct.

No appeal lies against a decree on judgment in accordance with an award, on the sole ground that the arbitrator had been guilty of misconduct. 29 A. 457=A.W.N. (1907), 717=4 A.L.J. 455. A

(7-a) Objection to the conduct of arbitrators—Revision.

No revision is maintainable on the ground of objections as to the conduct of the arbitrators. 32 Ind. Cas. 250. B

(8) Plaintiff's application to set aside award refused—Judgment given on award on defendant's application—Appeal.

Where an application by the plaintiff to set aside an award on the ground that arbitrator failed to submit his award within time was refused, and, subsequently, on the application of the defendants, judgment was given on the award, and the plaintiff appealed from this judgment. *Held*, that no appeal lay against such judgment either under the Code of Civil Procedure or under the Letters Patent. 39 C. 822. C

(9) Reference under Code of 1882—Order refusing to set aside award made after this Code—Appeal.

Where a reference to arbitration was made under S. 506, Civ. Pro. Code, 1882, and an order refusing to set aside the award was made by the Court on 20th March, 1909. *Held*, that the right of appeal was governed by the provisions of the Code of 1908 and that, therefore, no appeal lay against that order. 6 S.L.R. 168. D

(10) Revision in arbitration proceedings.

(a) Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 9 Ind. Cas. 385. E

(b) An order setting aside an award on the ground of the arbitrators' misconduct is not subject to revision. 4 Bom. L.R. 267=26 B. 551. F

3.—“*No award shall be set aside*”—(Concluded).

- (c) Where a subordinate Court erroneously sets aside an award on the ground of misconduct of the arbitrators, the Court cannot be considered to have acted illegally in the exercise of its jurisdiction, so as to justify interference in revision. 7 C.W.N. 545=30 C. 397. G

(11) *Suit to set aside award.*

A suit is not maintainable to set aside an award of the arbitrators appointed by a Revenue Officer under the Punjab Land Revenue Act, 1887. 52 P.R. 1898. H

4.—“*Except on one of the following grounds.*”

(1) *Grounds for setting aside an award.*

An award under arbitration proceedings could be set aside only on the grounds provided in Sch. II of the Civil Procedure Code of 1908. 32 Ind. Cas. 161. I

(1-a) *Nature of objections.*

(a) The parties to a reference are bound by the result of the arbitration, in the absence of proof that the award is open to just exceptions. 180 P.R. 1883. J

(b) A Court should not enquire into objections to the filing of an award other than those mentioned in this schedule. 91 P.R. 1898. K

(2) *Court cannot interfere with award on the ground that it is not correct.*

The arbitrator is the chosen Judge of the parties. His decision is final and the Court has no right whatever to touch that decision or interfere with it, merely on the ground that it is not correct or that it is the result of bias. 14 Bom. L.R. 1007. L

(3) *Award being against written statement.*

An objection that an award is against the written statement of the defendant is not sufficient to set aside an award. 7 W.R. 28. M

(4) *Arbitrator, being a relative of party.*

Nor is a charge of partiality on the ground that an arbitrator is a relative of a party is sufficient to set aside award. 22 W.R. 447; 7 A. 273=A.W.N. (1885) 12. N

(5) *Decision on evidence not strictly legal.*

An award cannot be set aside on the ground that the arbitrators received and decided the case on evidence not strictly legal. 4 C. 281; 11 M. 85. O

(6) *Party's ignorance of proceedings before arbitrators.*

Nor an objection that a party, through the fault of his agent, was ignorant of the proceedings before the arbitrators is a sufficient ground for setting aside award. 1 Tay. and Bell, 41. P

(7) *Formal defect in award.*

An award of the arbitrators should not be set aside lightly or for a merely formal defect, where the parties had consented to abide by their decision. 65 P.R. 1899. Q

(8) *Arbitrator proceeding on ignorance of law.*

An award cannot be set aside on the ground that the arbitrators proceeded on an ignorance of law. 47 P.R. 1887; 29 C. 167=6 C.W.N. 226=29 I.A. 51. R

4.—“*Except on one of the following grounds*”—(Continued).

(9) Arbitrators deriving information on matters of law.

It would be prudent and discreet for arbitrators, when they desire to put themselves on the best footing of information as to matters^{*} of law, to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. But, if they cannot be shown to have acted with improper partiality or for any other purpose than that of being correctly informed about the law and avoiding mistakes of law, their award should not on that ground be set aside. *Rolland v. Cassidy*, (1888) L.R. 13 App. Cas. 770; 29 C. 854=7 C.W.N. 82=4 Bom. L.R. 673. S

(10) Absence of one of the arbitrators.

An award cannot be set aside on the ground that the arbitrator of one of the parties was absent. (1880) S.C. Part X, No. 16. T

(11) Improper reception of evidence.

The improper reception in evidence, by arbitrators of a document not legally admissible, is not in itself a sufficient ground for refusing to confirm the award of arbitrators. 4 C. 231=2 C.L.R. 488. But see B.L.R. Sup. Vol. 505=6 W.R. Mis. 83. U

(12) Arbitrators' connection with the subject-matter.

A party appointing an arbitrator with full knowledge of his connection with the subject-matter cannot object to the award of the arbitrator on the ground of that connection. 2 U.B.R. (1897—1901), p. 8. V

(13) Examination of witness in the absence of some of the arbitrators.

Where, notwithstanding that some witnesses were examined by some arbitrators in the absence of the others, a party took part in the proceedings, such conduct on his part amounted to a waiver of the irregularity in the procedure. 2 U.B.R. (1897-1901), p. 21. W

(14) Award dictated and signed by parties—Registration—Signing parties whether allowed to pick holes in award.

A document signed by arbitrators as their award does not cease to be an award merely because the settlement was arrived at by the parties and was also signed by them.

Such documents did not require registration. Where the parties have themselves signed the award, they should not be allowed to pick holes in it. 184 P.L.R. 1914=22 Ind. Cas. 412=101 P.W.R. 1914. X

(15) Order of reference fixing no date for making the award.

A Court set aside an award on the ground that no date had been fixed by the order of reference for the making of the award and that no notice of its filing was given to the plaintiff. An objection to the filing of the award had, however, been made within time: *Held*, that in setting aside the award, the Court acted illegally and with material irregularity, 32 Ind. Cas. 845. Y

(16) Proceedings conducted in the absence of a party.

An award was set aside on the ground that the arbitrators conducted proceedings in the absence of one of the parties and did not give them reasonable opportunity of being heard. 8 C.W.N. 861. Z

4.—“ Except on one of the following grounds ”—(Concluded).

(17) Arbitrators adding one to their number.

An award was set aside on the ground that the arbitrators had added another to their number. 7 A.H.C. 367. A

5.—“ Corruption or misconduct.”

(1) Illegal gratification accepted by one of the arbitrators.

Where one of the arbitrators is guilty of misconduct and is found to have accepted an illegal gratification from one of the parties concerned, the award ought to be set aside in its entirety, inasmuch as it is difficult to say how far the other arbitrators were influenced by the biased and interested opinion of one of them. 18 Ind. Cas. 92. B

(2) Misconduct, meaning.

(a) The word “ misconduct ” as used in this paragraph does not necessarily comprehend or include misconduct of a fraudulent or improper character, but it does comprehend and include action on the part of the arbitrator which is, upon the face of it, opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide upon questions in difference and dispute referred to him by the parties. A.W.N. (1889) 124. C

(b) ‘Misconduct’ does not of necessity imply ‘corruption,’ though ‘corruption’ necessarily implies ‘misconduct.’ 80 C. 397=7 C.W.N. 545. D

(c) The term ‘misconduct’ in this paragraph as applied to proceedings before arbitrators, covers the violation of their duties and responsibilities as expected from them by Courts of Justice. It does not necessarily imply corruption or any other moral turpitude on their part. There may be ample misconduct in the legal sense sufficient to make the Court set aside an award, even when there is no ground for imputing the slightest improper motive to the arbitrator. 9 A. 258. E

(d) So, an award will be set aside where the arbitrator has improperly refused to grant the necessary adjournments to the parties, or where he has refused to hear the necessary evidence within the scope of the reference, so likewise, if he has examined a witness or a party in the absence of his opponent. 9 A. 258. F

(2-a) Arbitrator should act with scrupulous fairness towards both parties.

(a) It is because the award of an umpire or arbitrator is final and the party against whom it is made is debarred from appealing to any Court of law, however unjust the award may be, that the Courts have been most anxious to see that nothing unfair or irregular is done by the arbitrator or umpire while discharging his duties as such. The Courts have always been most alert to interfere and set aside any award in which it appears that the arbitrator or umpire has not acted with scrupulous fairness towards both parties. 14 Bom. L.R. 1007. G

(b) The Courts, in cases of reference to arbitration through the Court, have always exercised a most careful and vigilant supervision over the conduct of the arbitrator, to whom, at the request of the parties, it delegates the duty of deciding disputes between the parties, and any irregularity or action which is not consonant with the general principles of equity and good conscience which ought to govern the conduct of an arbitrator is resented by immediately brushing aside the award of the arbitrator against whose decision there is no appeal. 14 Bom. L.R. 1007. H

5.—“*Corruption or misconduct*”—(Continued).

(2-b) Conduct of arbitrators should not be liable to misconstruction.

It is of the highest importance, in the interest of the parties making a reference and in the interest of the arbitration generally, that arbitrators should do nothing to make their conduct liable to misconstruction or to shake the confidence reposed by the parties in them. 18 Ind. Cas. 92. I

(3) Clauses (a) not applicable where there is no award.

Sch. II, Cl. 15 (1) (a) of the Civ. Pro. Code has no application where the award has not been given. 251 P.W.R. 1912=125 P.R. 195. J

(4) Misconduct—Examples.

(i) PRIVATE AND SECRET INQUIRIES BY ARBITRATOR.

It is legal misconduct on the part of the arbitrator to make private and secret inquiries and to make his award on information which he has privately obtained. 4 A.L.J. 159=A.W.N. (1907) 75. K

(ii) NEGLECT TO ATTEND MEETING.

The neglect of some of the arbitrators to attend arbitration meetings is a misconduct justifying the setting aside of the award. 8 W.R. 171. L

(iii) PERVERSITY IS MISCONDUCT.

Perversity is misconduct within the meaning of S. 15 of the second schedule of the Code, and a Court would be justified in setting aside an award on that ground. 14 Ind. Cas. 978. M

(iv) ARBITRATOR NOT TO RECEIVE EVIDENCE IN THE ABSENCE OF A PARTY.

(a) It is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it. *Audi Alteram Partem* is a rule of justice of universal application and must be observed by the established Courts of Justice, by the arbitrators, or by special tribunals like caste panchayats. 18 B. 299. N

(b) When the arbitrators recorded the evidence of one party in the absence of the other and omitted to give the latter opportunity to produce his own evidence, the Court was justified in setting aside the award. 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1908. O

(c) In 3 C.W.N. 361, Maclean, C.J., observed as follows:—In my opinion the arbitrators put themselves in the wrong *ab initio* by holding their first meeting behind the backs of the appellants. It is all very well to say nothing was done at that meeting; but how do we know what may or may not have been said by the plaintiffs? They may, for aught we know, have made *ex parte* statements to the arbitrators about the case, they may have instilled some poison into the arbitrators' minds to the prejudice of the defendants, and so conducted themselves as to warp the judgment of the arbitrators in relation to the case to be subsequently presented by the defendants. In holding this meeting the arbitrators do not appear to me to have acted with that absolute impartiality, with that sense of fairness to both sides, which is so essential, so preliminary an element in cases of this class. I am by no means prepared to say that this *ex parte* meeting

5.—“Corruption or misconduct”—(Continued).

is not alone sufficient to warrant the Court in setting aside the award. But apart from this, they did not give the defendant a fair and reasonable opportunity of laying their views before him. They appear to me to have rushed the hearing of the case.”

- (d) Where a witness was examined by some of the arbitrators, and subsequently all of them refused to examine the witness that had already been examined, such refusal amounted to misconduct on their part. 2 U.B.R. (1897-1901), p. 14; 12 M. 113. P

(v) NOT GIVING OPPORTUNITY TO PROVE CONTENTION.

Failure to give an opportunity to a party for proving his contention is misconduct. 9 A.W.N. 124. Q

(vi) REFUSAL TO EXAMINE ALL WITNESSES.

(a) An arbitrator is bound to examine all the witnesses produced before him, and a refusal to do so is misconduct on his part. 58 P.R. 1889. R

(b) An award was set aside on the ground that the arbitrators refused to hear witnesses produced by either party. 12 C.L.R. 564. S

(vii) REFUSAL TO AMEND AWARD REMITTED ON GROUND OF ILLEGALITY.

So is a refusal on the part of the arbitrators to amend an award remitted to them for reconsideration on the ground of illegality. 101 P.R. 1888. T

(viii) CERTAIN ARBITRATORS BEING ABSENT AT THE TIME OF MAKING AWARD.

An allegation that certain arbitrators were not present at the time the award was made and did not sign the award, though it purported to have been signed also by them, is a charge of misconduct. 29 C. 36=22 W.R. 418. U

(ix) AGREEMENT TO EXCLUDE CERTAIN EVIDENCE IN ARBITRATION—ARBITRATOR ADMITTING AND DECIDING CASE ON THAT EVIDENCE.

All matters in dispute in a suit were referred by the Court to arbitration, upon the basis and footing that a certain piece of evidence was to be excluded from its consideration. In the course of the proceedings, the arbitrator admitted, at the instance of one party, and in spite of the protest of the other party, the evidence, and acting upon it shifted the burden of proof from one side to the other. The other side again protested, and withdrew from the arbitration. The arbitrator proceeded *ex parte* and gave his award. A motion having been made to the Court to set aside the award; Held that, in admitting the evidence complained of, the arbitrator committed a breach of the directions of the Court and a grave error of judgment which prejudiced the case; and that he was, therefore, guilty of what in law was called ‘misconduct.’ 14 Bom. L.R. 1007. V

(x) HONEST ADMISSION OF DOCUMENT IN VIOLATION OF RULE OF EVIDENCE.

(a) The honest, though mistaken, admission by arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* would not be a ground for setting aside an award. 19 Ind. Cas. 934. W

(b) A suit was referred to arbitration with a stipulation that the arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiffs be not taken into consideration by them. During the arbitration proceedings the question arose whether the debt of a particular item was proved. An adjusted account was tendered in evidence by the plaintiff in which account the item appeared, and

5.—“*Corruption or misconduct*”—(Continued).

the signature on which had been admitted by the other side in his written statement. The defendant objected, but the adjusted account was accepted in evidence in proof of the debt. The defendant, however, did not seek the interposition of the Court for a proper construction of the terms of the reference : he withdrew from the case, and allowed the inquiry to go on, and it was only when the award had been made, that he asked the Court to interfere and set the award aside as a nullity: *Held*, that the arbitrator's action did not amount to misconduct and the award was valid. 19 Ind. Cas. 934. X

(5) What is not misconduct.

(i) DELAY IN MAKING AWARD.

In attention or delay on the part of the arbitrators does not amount to misconduct. 41 P.R. 1875. Y

(ii) DELEGATION OF MINISTERIAL ACTS TO THIRD PERSON.

An arbitrator may delegate to a third person the performance of acts of a ministerial character. Such delegation does not amount to misconduct. 29 C. 854=7 C.W.N. 82=4 Bom.L.R. 678. Z

(iii) DISREGARD OF LAW.

Open disregard of proved law or custom is not misconduct. 12 P.R. 1869. A

(iv) DECISION ACCORDING TO INTENTION OF FATHER OF PARTIES.

Where, in a dispute between the members of a family as to the division among them of the family properties, an arbitrator was selected by reason of his knowledge of the circumstance of the family, a decision of the arbitrator giving effect to what he conceived to be the intention of the father of the parties was not bad for misconduct. 70 P.R. 1891. B

(v) FAILURE OF AN ARBITRATOR TO ATTEND A FORMAL SITTING.

Where all the disputed matters between the parties were decided by the arbitrators at sittings, when all were present, the fact that one of them did not attend some of their sittings, when no business of a disputed character was gone into, would not amount to misconduct. 2 C.L.J. 61. C

(vi) SURMISE OF PARTIALITY.

An award cannot be set aside on the mere suspicion that the arbitrator has been partial. 7 A. 273=5 A.W.N. 12; 22 W.R. 447. D

(6) Full enquiry into the objections necessary.

(a) A Court should make full enquiry into the objections made to an award before setting it aside. 2 N.W.P. 241. E

(b) The Court should record its opinion as to the truth or otherwise of the allegation. 12 P.R. 1869. F

(7) Who is to determine the misconduct of arbitrator.

The duty of determining whether an arbitrator duly appointed has or has not been guilty of misconduct, has been left by the Legislature to the Court in which the award is filed. 16 Ind. Cas. 595. G

(8) Appellate Court—Plea of corruption rejected by first Court.

A plea of corruption of arbitrators rejected by the Court of first instance cannot be taken up by the Appellate Court. C.C.'s S.C., 18th June 1864 (O.C.). H

5.—“Corruption or misconduct”—(Concluded).

(9) Misconduct sufficient to set aside award.

In order that a Court may set aside an award on the ground of misconduct, the misconduct charged must amount to corruption or fraud or something from which corruption or fraud might be inferred. 2 C.P.L.R. 202. I

(10) Misconduct of arbitrator does not render the award a nullity.

The fact that a duly appointed arbitrator has been guilty of misconduct in making an award does not render the award a nullity. Such an award cannot be described as being no award at all. 16 Ind. Cas. 595. J

(11) Charge of misconduct—Action against party.

No action for damages would lie against a party for imputing corruption to the arbitrators appointed in a suit, though the charge was false and unfounded and made from express malice. 16 P.R. 1879. K

6.—“Fraudulent concealment....disclosed.”

(1) Fraudulent concealment of material facts affecting submission.

In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. 25 C. 141. L

(2) Fraud must be alleged and proved.

In order to set aside an award on the ground of deceit or fraud, there must have been some fraudulent suppression of evidence or other malpractice of the successful party which must be definitely stated in the plaint. 1 Ind. Jur. O.C. 12. M

(3) Arbitrator, the retained pleader of a party.

(a) Where the arbitrator is the retained pleader of the plaintiff, and when there is no disclosure of that fact before the appointment of the arbitrator to the defendant who goes to arbitration consequently in ignorance of that fact, the award is not valid and binding on the defendant. 25 C. 141. N

(b) The omission of the arbitrator to disclose the fact that he was consulted, engaged, or retained by a party previous to the arbitration is such misconduct as to vitiate the award. U.B.R. (1897—1901), 13. O

(4) Arbitrator, am-muktear of one of the parties.

If after reference it transpires that the arbitrator has been acting as am-muktear of one of the parties without remuneration, the other party can withdraw from the reference. An award made by such arbitrator, after receipt of notice of revocation, cannot be enforced by suit. 29 C. 278—6 C.W.N. 235. P

(5) Indebtedness of arbitrator to a party.

“Where an arbitrator, being indebted to one of the parties at the time of the reference, or being so indebted after the reference, fails in either case to

6.—“Fraudulent concealment....disclosed”—(Concluded).

disclose, the fact to the other party, such party is entitled to revoke the reference on discovery of the fact. Any award of such arbitrator is invalid. 29 C. 278=6 C.W.N. 235.

9

- (6) **Personal interest of arbitrator in the subject-matter of the award, insignificant and unknown to himself.**

If an arbitrator, unknown to one of the parties, has personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award. 19 C.W.N. 165.

R

7.—“Being otherwise invalid.”

- (1) **Award, not *prima facie* illegal.**

Where there was no illegality on the face of an award, a Court was not justified in setting it aside and determining to proceed with the suit. 2 A. 118. S.

- (2) **Notice of the meeting of arbitrators not given to a party.**

An award is not rendered invalid by the want of notice of the meeting of the arbitrators to a party, who, prior to such meeting has written a letter to the arbitrators purporting to revoke the submission. 29 M. 44. T

- (3) **Receipt of fees by arbitrator.**

An award is not invalidated by the fact that the arbitrators have received remuneration for their trouble, when the offer proceeded from the parties themselves, and was made at a meeting of the arbitrators at which both the parties were present and was accepted formally, a record being made in the proceedings of the arbitrators. 29 M. 44. U

- (4) **Evidence recorded by umpire alone.**

An award made on evidence recorded by the umpire alone, the arbitrators not attending any of the sittings, is not valid. 1 O.C. 181. V

- (5) **Award in excess of authority.**

An award in excess of authority is not valid. 6 C.P.L.R. 95. W

- (6) **Award against person not consenting to arbitration.**

Where the plaintiff and only one of the defendants consented to arbitration, and the arbitrators passed an award against all the defendants, the award was illegal, and the Court was wrong in adopting it, by striking out the name of the non-consenting defendant. 3 P.R. 1872. X

- (6-a) **Award touching the interest of strangers.**

As a submission only refers to the arbitrator questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. 21 C.L.J. 278. Y

- (7) **Award not complying with order of reference.**

Where the object of a reference was that certain accounts should be examined by the arbitrators, an award arrived at without such examination was not valid. 5 P.R. 1876. Z

7.—“*Being otherwise invalid*”—(Continued).

(8) Award by unwilling arbitrators.

An award made by arbitrators, who were unwilling to act, was not valid. 4
A.W.N. 209; 7 A. 20=4 A.W.N. 212. A

(9) Award by persons not addressed to in order of reference.

An award purporting to be made by persons more than were addressed to in the
order of reference is not valid. 7 N.W.P. 367. B

(10) Award not complying with order of remission.

An award made without taking evidence, as required in the order of remission,
is not valid. 18 A.W.N. 45. C

(11) One arbitrator not joining in decision.

Where an agreement to refer, contemplated that all the arbitrators should take
part in the decision of the case and one of the arbitrators did not join in
the decision, the award was not binding on the parties. 55 P.R. 1882. D

(12) Award when not valid.

(a) An award was not bad, on the ground that two of the arbitrators ceased
with the consent of the parties and argued the case before the other
arbitrators, when there was provision in the order of reference for the
remaining arbitrators to proceed with the case during the absence of some
of them. 9 C. 905; 12 C.L.R. 525. E

(b) An award of talukdars of Oudh not filed within six months after the passing
of the Oudh Estates Act, 1869, was not, on that account, invalid. 28 C.
888=28 I.A. 64. F

(c) An award is not invalid, because the arbitrators adopted, as their decision,
the agreement arrived at and signed by the parties. 23 A. 224=20 A.W.
N. 52. G

(d) Nor because it was in accordance with a compromise or agreement between
the parties. 5 A.W.N. 259; 12 A.W.N. 79. H

(e) Nor because the arbitrator did not give his reasons for his decision or enter
into details 167 P.R. 1889. I

(f) In the absence of any provision for consultation between the arbitrators and
umpire, an award is not invalid, merely because that the umpire did not
confer with the arbitrators. 6 P.R. 1891. J

(g) Where an award was remitted as being incomplete and the arbitrators filed
a second award after making the investigations directed by the Court, the
second award could not be considered a nullity, merely because it differed
from the first. 50 P.R. 1889. K

(h) Where it was provided that the decision of the arbitrators should rest with
the majority, an award arrived at by the majority was not invalid merely
on the ground that the dissenting arbitrator did not record his separate
opinion. 112 P.R. 1885. L

(i) It is not a valid objection to an award that the arbitrators have not acted in
strict conformity to the rules of evidence. 11 M. 85. See 9 Bom. L.R.
757. M

(13) Agreement to refer—Parties minors—Whether leave of Court necessary.

The intention of the legislature in using the words ‘otherwise invalid’ in para 15
of the Second Schedule to the Code is that all questions raised about the

7.—“*Being otherwise invalid*”—(Concluded).

invalidity of the award, whether legal or otherwise, should be tried by the Court which refers a case to arbitration and by no other Court. Where a matter in dispute between parties, some of whom were minors, represented by guardians, was referred to arbitration through Court, but leave of Court was not obtained before the order of reference was made, and no objection was taken before the Court of first instance to the invalidity of the award on the ground that leave of Court to refer was not obtained, and the Court passed a decree in accordance with the award, held, that no appeal lay against the decree. 12 A.L.J. 57=21 Ind. Cas. 989=86 A. 69 (E.B.). N

Per Richards, C.J., and Ryves, J.—All that the parties, when they wish to refer a matter to arbitration, have to do is to apply to the Court to make the reference, and the order of reference is made by Court. It is, therefore, unnecessary to obtain the leave of Court before making an application to refer. O. XXXII, r. 7, does not control proceedings under the Second Schedule to the Code of 1908. (*Ibid.*) O

8.—“*Where an award becomes void*.”

(1) Award declared void—Suit to enforce such award.

Where an award is declared void, a regular suit to enforce such award is not maintainable. 19 P.R. 1907=46 P.L.R. 1907. P

(2) Portion of award dealing with matters beyond the jurisdiction of Civil Court.

An award, a portion of which dealing with matters beyond the jurisdiction of the Civil Court being incapable of enforcement as a whole, does not bar a suit, in respect of the matter contained in it, cognizable by the Civil Court. 56 P.R. 1886. Q

(3) Irregularity by Court.

A party cannot take advantage of an irregularity committed by the Court at his instance. 15 P.R. 1899. R

(4) Acquiescence in setting aside award.

An acquiescence in the proceedings of the Court after setting aside the award will prevent a party from insisting upon the award. 117 P.R. 1876. S

9.—“*Make an order superseding the arbitration*.”

Order superseding reference—Appeal.

An order of Court setting aside an arbitration award and superseding the arbitration proceedings is an order affecting the decision of the case within the meaning of S. 105 of the Code, and an appeal lies against such an order. 13 A.L.J. 553=37 A. 456=29 Ind. Cas. 411. T

16. (1) Where the Court sees no cause to remit the award or any Judgment to be of the matters referred to arbitration for reconsideration according to award. In manner aforesaid, and no application has been made to set aside the award ¹, or the Court has refused such application, the Court shall, after the time for making such application has expired ², proceed to pronounce judgment according to the award ³.

(2) Upon the judgment so pronounced a decree shall follow ⁴, and no appeal shall lie from such decree ⁵ except in so far as the decree is in excess of, or not in accordance with, the award ⁶.

(NOTES).

(1) Old Act.

This rule corresponds to S. 522 of Act XIV of 1882.

(2) Analogous Law.

compare i. S. 206 of the N.W.P. and Oudh Land Revenue Act, 1901.

ii. Ss. 133, 134 and 135 of the Punjab Land Revenue Act (XVII of 1887). U

1.—“No application has been made to set aside the award.”

(1) Construction.

The expression “no application has been made to set aside the award” is comprehensive enough to cover the case of an application to set aside the award on the ground that there was no award valid in law, and refers to a contingency other than the remission of an award. 17 Ind. Cas. 7=18 C.L.J. 35. V

(2) Remission of award.

The expression “no application has been made to set aside the award” in this rule refers to a contingency other than remission of award. 18 C.L.J. 35. W

2.—“After the time....has expired.”

(1) Power of Court to extend time for filing objections.

It is not competent to the Court under S. 5 of the Limitation Act to extend the period of ten days prescribed by Art. 158, Sch. II, of the said Act, for filing objections to an award. 18 C.L.J. 35. X

(2) Award passed before time allowed for application to set it aside.

(a) REVISION.

Where the Lower Court passed its judgment and decree before the expiry of the time allowed by law for making an application to set aside an award, notwithstanding the express provision of r. 16, Sch. II, Civ. Pro. Code, 1908, that the judgment and decree are to be passed after the time for such application has passed: Held, that the Lower Court acted without jurisdiction or with material irregularity in the exercise of its jurisdiction, so as to call for the interference of the High Court under S. 115, Civ. Pro. Code, 1908. 12 M.L.T. 608=(1912) M.W.N. 1232. See also 29 C. 167. Y

(b) APPEAL.

Quare—Whether an appeal lies against such judgment and decree. 12 M.L.T. 608=(1912) M.W.N. 1232. Z

(3) Remedy in case insufficient time is allowed.

Where, instead of ten days, only a few hours are allowed for objecting to an award, the proper remedy for the aggrieved party is a review of the judgment on the award. 3 M. 59. A

3.—“Pronounce judgment according to the award.”

Judgment should be in accordance with award.

In the absence of grounds to set aside an award, a Court is bound to deliver judgment in accordance with the award, 4 O.C. 82; and should not modify it in any way. 2 N.W.P. 150. B

4.—“A decree shall follow.”

- (1) Award directing realization of amount by sale of property—Power of Court to pass personal decree.

Where an award directed the realization of the amount due to the plaintiff by sale of the property belonging to the defendant, the Court had no jurisdiction to pass a personal decree against the defendant. 39 P.R. 1878. C

- (2) Decree giving effect to award—Construction.

A decree giving effect to award will have the same meaning as the award. 3
Bom. L.R. 482. D

- (3) Decree on award—*Res judicata*.

A judgment and decree passed in terms of an award operate as *res judicata*. 7
C. 727=9 C.L.R. 377; 21 B. 465. E

- (3-a) Award—Subsequent suit in Civil Court, maintainability of—*Res judicata*.

An award given by arbitrators in a mutation proceeding is no bar to a subsequent suit for possession in a Civil Court. 33 Ind. Cas. 761. F

- (4) Effect of decree.

A decree in terms of an award is not a private alienation. 4 A. 219 (p. 225). G

5.—“No appeal shall lie from such decree.”

A.—Appeal from decrees.

- (1) Decree passed in accordance of award—Appeal.

No appeal lies from a decree upon an award pronounced under this section except in so far as the decree may be in excess of, or not in accordance with the award. The principle of finality which finds expression in this section is in accordance with modern decisions, and now-a-days, no Court will sit as a Court of appeal on awards in respect of matters of fact or in respect of matters of law. *Adams v. Great North of Scotland Railway Co.*, (1891) L.R.A.C. 31; 12 C.W.N. 585 (P.C.)=7 C.L.J. 520=188 P.L.R. 1908=10 Bom. L.R. 581=18 M.L.J. 266=99 P.W.R. 1908=14 Bur. L.R. 146=4 M.L.T. 25=80 P.R. 1908=35 C. 648=85 I.A. 83; 5 Ind. Cas. 621; 78 P.W.R. 1910=6 Ind. Cas. 968; 6 C.W.N. 226=4 Bom. L.R. 161=29 C. 167=29 I.A. 51; 74 P.R. 1894; 25 P.R. 1902; 5 O.C. 13; 10 C.W.N. 601=2 C.L.J. 153; 17 P.R. 1883; A.W.N. (1907) 117=4 A.L.J. 455=29 A. 457; 8 C.W.N. 916; 18 C.L.J. 35; 29 P.R. 1915; 17 O.C. 386; 32 Ind. Cas. 250. H

- (1-a) Decree in terms of award—Both parties consenting to appeal against such decree—Effect.

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the appellate Court jurisdiction to entertain an appeal against such decree. 29 Ind. Cas. 409. I

- (1-b) Agreement not to appeal, whether binding.

An agreement not to appeal is binding as between the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator. 26 Ind. Cas. 355. J

- (2) Judgment in excess of award.

This section does not allow an appeal on the ground that the judgment is in excess of the award, but only on the ground that the decree is so. 8 C.L.J. 476. K

5.—“No appeal shall lie from such decree”—(Continued).

A.—Appeal from decrees—(Continued).

(3) Decree on award embodying terms of settlement come to by the parties.

An award embodying the result of a settlement come to by the parties is not invalid, and no appeal lies against the decree passed on that award. 22 A. 224 ; 5 A.W.N. 259. L

(4) Decree on award in a reference not joined in by all parties.

Where, in a suit, one of the defendants alone appeared and the others did not enter any appearance at all, no appeal lay against a decree passed on an award on a reference by the parties who appeared, on the ground that there was no legal and valid award, inasmuch as all the parties did not join in the reference. 33 C. 899. See also 4 P.R. 1882; 33 P.R. 1881; 170 P.R. 1889; 9 C.W.N. 873. M

(5) Irregularities in the procedure of arbitrators.

No appeal lies from a decree on an award on the ground of the irregularities in the procedure of the arbitrators where the irregularities are not such as to render the award no award in law. 18 A. 414 = 16 A.W.N. 116. N

(6) Plea of limitation not considered by arbitrator.

Nor on the ground that the arbitrator did not consider the plea of limitation. 12 A.W.N. 151 ; 1 A.W.N. 17. O

(7) Refusal of some arbitrators to act—New arbitrators appointed by Court after their death—Award by all—Appeal.

An agreement to refer matters in dispute to five arbitrators was filed under S. 528 of the Code of 1882. Two arbitrators, who had never consented to act, refused to act and subsequently died. The Court appointed new arbitrators in their stead. The three of the old and the two new arbitrators made an award, and the Court passed a decree in accordance with it; Held; by the Full Bench, that no appeal lay against the decree, though the award, not having been made by the tribunal constituted in accordance with the agreement of the parties, was invalid. 9 Ind. Cas. 173 (F.B.) = 9 M.L.T. 251. P

Per White, C J.—If an arbitrator once consents to act and then refuses or dies etc., the Court can appoint a new arbitrator under S. 510, independently of the wishes of the parties, but not otherwise. An award made by a tribunal of arbitration, not constituted in accordance with the provisions of the Code, is invalid. A defect in the constitution of a tribunal of arbitration is no ground for remitting an award under S. 520 or for setting it aside under S. 521. (Ibid.). Q

Per Krishnaswami Aiyar, J.—When a decree is in accordance with the award, no appeal lies except in so far as the decree is in excess of or not in accordance with the award, even if the award was invalid for want of submission, or for any irregularity in the reference, or for any other cause whatsoever, and whether an application to set it aside was not made or was made and refused. But if the arbitrators refuse to reconsider an award remitted to them, it becomes void. Therefore, a decree passed in accordance with such award is not a decree under S. 522 and is appealable. (Ibid.). R

5.—“*No appeal shall lie from such decree*”—(Continued).

A.—Appeal from decrees—(Continued).

(8) Decree modified in accordance with award—Appeal.

No appeal lies from a decree passed upon an award which was in accordance with it and not in excess of it, where the Court of first instance has heard the objections thereto and modified the award so far as it was in excess of the actual reference. 9 A.L.J. 258. S

(9) Decree passed according to revised award.

Where the Court remits an award to the arbitrators under r. 14 and the arbitrators submit a revised award and the Court passes a decree under this rule according to the revised award, no appeal lies against such a decree on the ground that the order of remittal was wrong. 31 M. 479=4 M.L.T. 328 =18 M.L.J. 485. T

(10) Decree in accordance with award—Refusal by two out of five arbitrators to sign the award—Appeal.

No appeal lies from the decree of a Court passed in accordance with an award, in a case where five arbitrators were nominated and two of the arbitrators appointed by one party refused to sign it but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. 7 A.L.J. 890=7 Ind. Cas. 99. U

(10-a) Court appointed as arbitrator—Objections to the award can be raised only by way of appeal.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting parties to put in objections before passing a decree. Such an award is itself a decree and objections to the award can be raised only by way of appeal against the decree to the appellate Court and not by means of applications to the Court itself. 26 Ind. Cas. 355. See also 26 M. 76 (77); 38 C. 421. V

(10-b) Award not valid in law.

When a decree has followed an award, it is not appealable on the ground that the award is altogether invalid because the arbitrator failed to do certain things which he was bound to do under his appointment, nor on the ground that he has been guilty of misconduct in not carrying out the duties which were imposed on him. 19 Ind. Cas. 405. W

(11) Void award—Appeal.

(a) An appeal lies when there is no award in fact or when there is a void award. 14 C.L.J. 143; 29 B. 285=6 Bom. L.R. 1132; see 33 C. 899; 6 S.L.R. 168.

(b) In a suit for partition a reference to arbitration was made at the request of the parties. The arbitrators submitted an award and a decree was passed in accordance therewith. The first defendant appealed on the ground that the award was void *ab initio* as no notice was given to one of the arbitrators and as the award was signed by only one of them. Held, that no appeal lay on the ground alleged, as under S. 522, Civ. Pro. Code, an appeal lay only in so far as the decree was in excess of, or not in accordance with the award. 6 M.L.T. 176=4 Ind. Cas. 87. X

(11-a) Award not valid in law—Appeal.

A decree based upon an award is not open to appeal on the ground that there was no award valid in law. 17 Ind. Cas. 7=18 C.L.J. 35. Y

5.—“No appeal shall lie from such decree”—(Continued).

A.—Appeal from decrees—(Continued).

(12) Award itself should be legal to make the decree final.

- (a) The question whether under this section an appeal lies against a decree made in accordance with an award, depends upon the question whether the award itself is valid and legal. The section pre-supposes a valid and legal award and not an award upon which no decree could be pronounced. The section cannot apply to a case in which there has been no award in law or in fact. 38 C. 498; 25 C. 757 (F.B.); 26 M. 47=12 M.L.J. 396; 18 A. 422 (F.B.)=16 A.W.N. 137; 2 N.L.R. 81; 29 A. 584=A.W.N. (1907) 184=4 A.L.J. 450; 29 A. 426=A.W.N. (1907) 115=4 A.L.J. 458 (N); 4 A. 288; 6 A. 174 (F.B.); 11 M. 85. See also 8 A. 548; 11 C. 37; 24 O. 469; 25 C. 141; 15 M. 348; 17 B. 357; 12 A.W.N. 151; 18 M. 423. Z
- (b) A decree passed in an award made on a reference in Court in a pending suit or in an application under S. 17 or filed in Court under Ss. 20 and 21, is appealable, S. 21 notwithstanding, on grounds impeaching the reference or the legality of the award, or in other words, on grounds extraneous to the award. 84 P.R. 1901=112 P.L.R. 1901. A
- (c) Under the Code of Civil Procedure, 1908, in a case falling under paragraph 16 of Sch. II of the Code, the Court giving judgment in accordance with an invalid award must be taken to have decided that the invalid award is valid, the Court having jurisdiction to decide whether or not it has jurisdiction, and that decision is final. 19 Ind. Cas. 348. B
- (d) When a decree has followed an award, it is not appealable on the ground that the award is altogether invalid because the arbitrator failed to do certain things which he was bound to do under his appointment, nor on the ground that he has been guilty of misconduct in not carrying out the duties which were imposed on him. 19 Ind. Cas. 405. C
- (e) *Per* Pratt, J.C.—A decree passed in terms of an award under the old Civil Procedure Code would be appealable, if the award is void *ab initio*. 19 Ind. Cas. 348. D

(13) Decree based upon illegal reference is appealable.

- (a) An award made on a reference by Court in pursuance of an application by *only some of the parties* to the suit is illegal. Both an appeal and a second appeal lie from a decree passed upon such an award. 17 M.L.J. 894; 9 C.W.N. 373; 10 C.L.J. 41; 26 M. 47; see also 7 A.W.N. 315; 10 W.R. 468; 4 C.L.R. 65; 67 P.R. 1879. E
- (b) In 4 P.R. 1882, Plowden, J., observed as follows:—“By the provisions of S. 506 of the Code of Civil Procedure the consent of all parties to a suit is a condition precedent to the jurisdiction of a Court to make an order of reference under S. 508, and if only some of the parties consent, an award made upon such an order is not an award that renders a judgment or decree passed in accordance with it final as regards appeal under S. 522.” F

(14) Decree upon award made after time.

An appeal lies against a decree passed in terms of an award where the order of reference made by the Court fixes no time for the delivery of the award or where the award is made after the time prescribed by the Court. 8 A. 548=6 A.W.N. 175; 13 A. 300; 30 A. 169=5 A.L.J. 144=A.W.N. (1908) 59; 2 N.L.R. 81; 6 M.I.A. 184. But see 6 A.W.N. 151. G

5.—“*No appeal shall lie from such decree*”—(Continued).

A.—Appeal from decrees—(Continued).

- (15) Decree passed before time allowed for application to set aside the award.

Where a decree is passed in accordance with the terms of an award, but before the time for taking objections to the validity of the award has expired, an appeal lies against such decree. 29 A. 584=4 A.L.J. 450=A.W.N. (1907) 184; 48 P.R. 1882. H

- (16) Decree upon award which does not judicially dispose of objections to its validity.

Where certain objections were made to an award alleging misconduct and corruption and involving questions of fact and law with regard to certain applications made and orders passed, and the Judge gave judgment affirming the award, overruling the objections without giving the objector an opportunity of substantiating them, *held* that, as the Judge was not competent to give judgment in the matter without having judicially considered the objections, the decree which followed the judgment he gave was a bad decree in law, and was appealable notwithstanding the concluding portion of S. 21. 9 A.W.N. 15. I

- (17) Decree based upon award made after judicial determination of objections.

(a) Where the award is made after judicially determining the objections raised to its validity, no appeal lies against a decree passed in accordance with such award. 8 A.W.N. 131; 5 O.C. 15; 18 A. 414; 22 M. 172; 29 A. 457 = A.W.N. (1907) 115=4 A.L.J. 455 (F.B.); 89 P.R. 1902; 9 A.L.J. 258. J

(b) In 18 A. 422 (F.B.) Sir John Edge, C.J., in delivering the judgment of the Full Bench observed as follows:—"S. 522 enables the Court to pass judgment in accordance with the award, if it sees no cause to remit the award, or if no application has been made to set aside the award, or if the Court has refused an application to set aside the award. It follows that if an application to set aside the award is made, the Court cannot proceed to give judgment in accordance with the award, until it has refused the application, and the Court is not competent to refuse the application without considering and determining it. So, in our opinion when an application to set aside an award has been made, and has not been judicially determined, the Court is not competent to proceed under S. 522, and if it does proceed under that section, and make a decree, there is no prohibition in that section against an appeal from a decree made under those circumstances. If however an application to set aside an award is made on the ground of the misconduct of an arbitrator and that application is refused after judicial determination and a decree made under S. 522, which is in accordance with the award, and not in excess of it, no appeal lies. The award is not a void award in such a case, even though the Court may have wrongly decided the question of misconduct. At the most it might be a voidable award, and the Legislature has not chosen to allow an appeal from the judicial decision of a Court on a question of corruption or misconduct of an arbitrator." K

- (18) Decree on award without order of reference.

As there can be no legal award where there has been no order of reference, the decree though in terms of the award is appealable. 85 P.R. 1884. L

5.—“No appeal shall lie from such decree”—(Continued).

A.—Appeal from decrees—(Continued).

(18-a) Appointment of arbitrators not legal—Appeal.

Obiter :—Where there is no legal appointment of arbitrators, the award is a nullity and an appeal against the decree is maintainable. 11 P.W.R. 1916=28 P.R. 1916. M

(19) Costs not allowed by award—Appeal against decree in so far as it includes costs.

Where the award provides that parties bear their own costs, but the decree directs the plaintiffs to bear the costs of the defendant, the decree, so far as it includes costs, is appealable under S. 16 of second Schedule of the Civ. Pro. Code, and is not open to revision. 118 P.L.R. 1912. N

(19-a) Reference under old Code—Decree after new Code.

A reference to arbitration was made under S. 506 of Act XIV of 1882. An award was made and a decree passed in accordance therewith after Act V of 1908 had come in force: Held, that the question of the right of appeal must be determined by Act V of 1908 and not by Act XIV of 1882. 19 Ind. Cas. 348. O

(20) An appeal lies on the following grounds.

- (a) That the reference was illegal and, in consequence, the award was void. 26 M. 47. P
- (b) That there was no real agreement to refer to arbitrators and consequently there was no legal award. 134 P.R. 1888. Q
- (c) That there was no award in law or in fact. 6 A. 174=4 A.W.N. 15; 8 A. 64=6 A.W.N. 2; 23 A.W.N. 159; 29 A. 426=A.W.N. (1907) 115; 20 C. 855. R
- (d) That the award was too indefinite to be capable of execution. 70 P.R. 1881; 47 P.R. 1888. S
- (e) That the award determined matters not in accordance with the order of reference. 70 P.R. 1881. T
- (f) That the decree was not in accordance with the award. 60 P.R. 1896; 8 A. 449=6 A.W.N. 210. U
- (g) That the decree varied the award. 7 N.W.P. 86; 28 W.R. 105. V
- (h) That there was misconduct on the part of the arbitrators. 2 C.L.J. 61 (65). W
- (i) That an arbitrator was a debtor of a party, and the fact was not disclosed to the other party. 25 C. 757. X
- (j) That the arbitrator was the retained pleader of a party and the fact was not disclosed before the appointment. 25 C. 141. Y
- (k) That the lower Court committed an error in procedure or misused the jurisdiction prescribed by the Code. 89 P.R. 1902. Z

(21) Determination of question of appeal.

The question whether an appeal lies against a decree made in accordance with an award depends upon whether the award itself is valid and legal. An appeal lies if the award is not legal. 33 C. 498. A

(22) Finality of award and decree thereon.

- (a) A decree on an award cannot be set aside by a party, who had been served with a notice to file objections to the award and who chose to remain *ex parte*. 98 P.R. 1900. B

5.—“*No appeal shall lie from such decree*”—(Continued).

A.—Appeal from decrees—(Concluded).

- (b) When a decree has been passed on an award, neither the decree nor the award can be modified afterwards. 17 B. 657; 18 B. 495. C
- (c) When a person accepts benefits from an award, he cannot afterwards impeach it. 24 A. 164. D
- (d) The finality prescribed to an award applies only when it is regularly and properly arrived at. 184 P.R. 1898. E

B.—Appeal from orders.

(1) An appeal lies from orders in the following cases.

- (a) Order directing an award to be filed. 33 C. 757; 8 S.L.R. 190. F
- (b) Order refusing to file an award made without the intervention of Court. 2 C.L.J. 90. G
- (c) Order in execution of a decree, though passed on an award. 13 W.R. 62. H

(2) Appeal does not lie.

No appeal lies from an order setting aside an award. A.W.N. (1906) 64=3 A.L. J. 168=28 A. 408. I

C.—Review.

Review of decree passed in accordance with award.

A decree passed in accordance with an award is open to review. 111 P.R. 1881.J

D.—Revision.

(1) A revision lies on the following grounds.

- (a) That the Court had no jurisdiction to try the case in which the award was given. 8 M. 235. K
- (b) That the Court appointed the arbitrators without jurisdiction. 6 M. 414. L
- (c) That notice of the filing of the award was not given to the parties. 20 A. 474 = 18 A.W.N. 132. M
- (d) An application for revision of a decree based on an award can be entertained on the ground of material irregularity committed by the Court when no appeal under the Civil Procedure Code is maintainable against that decree, but such jurisdiction will be used very sparingly. 11 P.W.R. 1916=28 P.R. 1916. N

(2) Revision does not lie.

- (a) No revision lies from an order setting aside an award on the ground of the arbitrator's misconduct. 26 B. 551. O
- (b) A Court of revision will not interfere with the adjudication of the Court of first instance on the question of objection to an award, merely on the ground that the adjudication was erroneous. 58 P.R. 1899. P
- (c) Where an award embodying matters not referred to was delivered and a decree was passed in accordance with the award, the Chief Court had no power to interfere in revision. 68 P.L.R. 1905=41 P.R. 1905. Q
- (d) The law as to the circumstances in which revision by the Chief Court is allowable in cases of decrees based on, and in accordance with, awards, and as to the scope of such revisions, is pretty clearly defined in the Full

5.—“No appeal shall lie from such decree”—(Continued).

D.—Revision.—(Concluded).

Bench rulings 88 and 89 P.R. 1902, which interpret and apply the P.C. ruling 25 P.R. 1902, and in 4 P.R. 1907, a Division Bench case. Under the last mentioned ruling, the omission of sanction under O. XXXII, r. 7, Civ. Pro. Code, is no ground for revision. 99 P.R. 1915. R

- (e) Objections concerning the conduct of the arbitrators are no ground for revision. 99 P.R. 1915. S
- (f) An erroneous decision on a question of law does not amount to acting illegally or with material irregularity within the meaning of S. 115, Civ. Pro. Code (1908). 8 S.L.R. 190. T

E.—Second appeal.

(1) Second appeal.

- (a) When an appeal is not allowed, a second appeal does not lie. 6 C.W.N. 614, U
- (b) Where an Appellate Court reversed the decree of the first Court and passed a decree in accordance with an award of arbitration in the suit, no appeal lay from the decree of the Appellate Court. 26 I.L.R. 1905; see, also, 26 P.R. 1890; *contra*, 8 C.W.N. 390. V
- (c) The objection that an award was confirmed in the absence of the appellant could not be taken in second appeal, when not urged in the first Appellate Court. 50 P.R. 1881. W

(2) Award set aside by first Court—Decree by appellate Court in accordance with award—Second appeal.

The finality which attaches to a decree made in accordance with an award under this section refers only to a case in which such decree is made by the first Court, and does not apply to a case in which such a decree is made for the first time by the appellate Court in reversal of the order of the first Court. 2 C.L.J. 80; 8 C.W.N. 390; 12 C.L.R. 564; 5 P.R. 1880; 12 W.R. 93. See 28 A. 408 = 4 A.L.J. 168 = A.W.N. (1906) 64. X

(3) Order of lower appellate Court rejecting application to file award—Second appeal.

- (a) Plaintiff applied under Civ. Pro. Code (1908), Sch. II, para. 20, for filing an award made without the intervention of the Court. The Court of first instance found that part of the award was void and that the valid portion of the award was separable from the invalid portion and directed the award to be filed so far as it was free from invalidity.

On appeal the lower appellate Court held that a private award must be affirmed in its entirety or rejected *in toto* and rejected the application to file the award.

Held, that no second appeal lay against the decision of the lower appellate Court. The decision of the Court of first instance was only an ‘order’ and not a ‘decree’ and an appeal was preferred under S. 104 (f). A further appeal is prohibited by the terms of S. 104, sub-S. 2.

Held, further, that the second appeal could not be treated as a revision petition, because the lower appellate Court had made a mistake of law which was not a material irregularity, and because the plaintiff had another remedy by way of regular suit. 66 P.R. 1915 = 146 P.W.R. 1915. Y

5.—“*No appeal shall lie from such decree*”—(Continued).

E.—Second appeal—(Concluded).

- (b) Where there was an arbitration without the intervention of Court, an order refusing to file the award is not a decree. That order is appealable under S. 104 (1) (f), Civ. Pro. Code. But an appeal against an order passed in appeal directing an award to be filed is forbidden by S. 104 (2) of the Code. 7 L.B.R. 277=25 Ind. Cas. 7=8 Bur. L.T. 44. Z

F.—Appellate Court, Powers of.

(1) Power of Appellate Court to enquire into question of misconduct.

- (a) An appellate Court cannot enter into the question of the corruption or misconduct of an arbitrator, merely because he has delivered an award, which includes an adjudication on a matter not submitted to him. 13 P.R. 1906. A

- (b) Nor into the allegations of misconduct which had been heard and disposed of by the Court of first instance. 167 P.R. 1889. B

(2) Power of appellate Court to restore an award set aside by lower Court.

A Court of appeal has power to consider the validity of an order setting aside an award and to restore the award if it has been set aside on insufficient grounds. 15 Ind. Cas. 926=236 P.L.R. 1912. But see 3 C.W.N. 320. C

(3) Intention of Legislature in the matter.

The intention of the Legislature in the matter is not altogether clear. It is, however, manifest that there was no intention to allow an appeal from an order setting aside an award, otherwise this would have appeared among the orders from which an appeal is expressly allowed by S. 104, Civ. Pro. Code. On the other hand, the terms of S. 105 are sufficiently wide to support the theory that an order setting aside an award may be impeached on appeal. It can scarcely be argued that the words “affecting the decision of the case” which limit the operation of the privilege, do not apply in the case of an order setting aside an award. Clearly, the suppression of arbitration proceedings has a direct connection with the decision of the case. *Prima facie*, then, there is nothing in the law as it stands to prevent an aggrieved party from challenging in appeal an order setting aside an award, and in the interests of justice, it is doubtless desirable that the principle involved should receive recognition. 15 Ind. Cas. 928=236 P.L.R. 1912. D

G.—Miscellaneous.

(1) Suit after decree made in accordance with award.

A judgment and decree passed in accordance with an award will bar a subsequent suit in respect of the same matter. 21 B. 465; 7 G. 727. E

(2) Court constituted as arbitrator—Appeal.

- (a) Where both the parties to a suit agreed to be bound by the decision of the Court passed after inspecting the site in dispute and examining the documents filed by them, a decree passed by the Court after complying with those conditions was not appealable, as the Court was constituted an arbitrator by consent of both the parties. 26 M. 76. F

5.—“No appeal shall lie from such decree”—(Concluded).

G.—Miscellaneous—(Concluded).

(b) If a presiding Judge is appointed an arbitrator in his personal capacity, the parties cannot impeach whatever award may be made by him on the ground that he was the presiding Judge. *In re Durham, etc., Ex parte Wilson*, L.R. 7 Ch. 45; 4 A.L.J. 89=A.W.N. (1907) 35. See 26 Ind. Cas. 355.

(3) **Valuers not arbitrators.**

Referees for purpose of valuation are not arbitrators. 28 O. 115=5 C.W.N. 242.H

(4) **Award by ecclesiastical authorities.**

The rules regarding arbitration govern an award by the ecclesiastical authorities on a secular matter. U.B.R. (1892-1896), p. 11. I

6.—“Except in so far as the decree....award.”

(1) **Object of this exception.**

The words “except in so far as the decree is in excess of or not in accordance with the award” in this rule have been intended to enable the Court of appeal to check the improper use of the power conferred by r. 12, *supra*. 8 A. 449=A.W.N. (1886) 210. J

(2) **Award, meaning.**

The word “award” in the last sentence of this rule, means the award as given by the arbitrators, and not as amended by the Court under r. 12. 8 A. 449 ; 18 P.R. 1906; 12 O.C. 28 ; 1 Ind. Cas. 328. K

(3) **Rule contemplates written award.**

This rule contemplates an award in writing properly signed by the persons who make it. 14 C.L.J. 148. L

(4) **Award on matters outside the arbitration proceedings.**

The principle of finality which attaches to a decree passed in accordance with an award given in arbitration proceedings, does not affect matters which are outside the arbitration proceedings. 32 O. 881. M

ORDER OF REFERENCE ON AGREEMENTS TO REFER.

17. (1) Where any persons agree¹ in writing² that any difference³

Application to file in Court agreement to refer to arbitration.

between them shall be referred to arbitration⁴, the parties to the agreement, or any of them, may apply⁵ to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) ⁶ Where no sufficient cause is shown, the Court shall order the agreement to be filed ⁷, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.⁸

(NOTES).

(1) Old Act.

This rule corresponds to S. 523 of Act XIV of 1882.

N

(2) Scope of the rule.

This rule refers to cases in which persons, whether they be litigants or not, themselves agree, independently of the Court, to refer the matters in difference between them to arbitration and ask the Court to have the agreement filed. 27 A. 53=1 A.L.J. 399.

O

I.—“Any persons agree.”

(1) Private arbitration in a pending suit.

(a) Rules 17 and 20 contemplate arbitration without the intervention of the Court by “any persons” with respect to “any matter,” and contain no express exception as to parties to a suit or to matters in litigation in a suit or proceeding actually pending, and there is nothing in Rule 1 of the schedule showing an intention on the part of the Legislature to forbid arbitration by the parties to a suit without the intervention of the Court. 4 B. 1; 26 B. 76=3 Bom. L.R. 431; 8 Bom. L.R. 777; 24 C. 903; 24 M. 836. P

(b) A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment under S. 375 of C.P.C., 1882, and ought to be given effect to as such an adjustment of the suit. 12 M.L.T. 138=23 M.L.J. 290=1912 M.W.N. 1091. Q

(c) The mere fact that litigants agree to refer matters in dispute to a private arbitration does not make that arbitration an arbitration in the suit, unless there is an order of reference. 8 Bom. L.R. 777. R

(d) There is no provision of law which prevents parties from agreeing to refer the disputes pending in a suit between them to private arbitration, without making an application to the Court under S. 506, Civ. Pro. Code, 1882. 12 M.L.T. 138. S

(e) The award of the arbitrators in such a case will be binding on the parties who made the reference, provided the arbitrators were not guilty of misconduct. (*Ibid.*) T

(f) But in 20 C. 218=7 C.W.N. 180 in the light of the observations of their Lordships of the Judicial Committee in 29 C. 167 to the effect that S. 506 of the C.P.C., 1882, applies to the case where the parties have agreed to refer to arbitration in a pending suit, and S. 523 to the case where there is no pending litigation, it was doubted whether the contrary view expressed above could stand. U

I.—“Any persons agree”—(Concluded).

- (g) In 191 P.W.R. 1912=15 Ind. Cas. 140=115 P.R. 1912, it was held that during the pendency of a suit in a Court, it is not open to the parties to refer the matters in dispute to arbitration without the intervention of the Court, or, after an award has been made by the arbitrator appointed in this way, to apply to the Court that the award be filed. V
- (h) Such a submission and the award made in pursuance thereof are quite invalid. (*Ibid.*) See, also, 180 P.R. 1892; 50 P.R. 1891; 5 A.L.J. 617=A.W.N. (1908) 235=4 M.L.T. 892. But see 9 A. 168; 27 A. 58. W
- (i) Where a suit is referred by the parties to arbitration without the intervention of the Court and an award is made, the party who wishes to enforce the award should apply to the Court and prove to its satisfaction that the adjustment which he sets up was justly, legally, and properly arrived at. 37 B. 639=15 Bom. L.R. 340=19 Ind. Cas. 796. X
- (j) Where an agreement by itself makes no actual settlement but merely appoints two gentlemen as trustees to represent the plaintiff in taking an account from, and effecting a partition with, defendant, and thereafter to hold plaintiff's share in trust for him until his return from England. *Held* that it did not give the trustees the powers of arbitrators in the matter, and even if it did, it would be mere agreement to refer to arbitration a matter pending before a Court, which cannot be treated as an adjustment of the dispute under O. XXIII, r. 8, though an award or at any rate the acceptance of an award consequent on the arbitration may be so treated. Where the adjustment of some of the matters in dispute was made conditional on a certain arrangement set out in the agreement being accepted and acted upon. *Held*, that there was no adjustment even ‘in part’ within the meaning of O. XXIII, r. 8, C.P.C. 8 S.L.R. 137=27 Ind. Cas. 369. Y

(2) *Agreement in pending suit—Effect.*

An agreement to refer is binding on the parties, whether it is filed in Court or not, and, if made in a pending suit, bars the continuance of the suit by the Court. 27 A. 58. Z

(3) *Agreement, revocation of.*

- (a) A reference to arbitration without the intervention of Court cannot be revoked. 4 O.C. 17. A
- (b) A telegram for stay of proceedings does not amount to a revocation of the arbitrator's authority. 2 C. 445. B

*2.—“In writing.”**Agreement to refer to be in writing.*

This section applies only where the agreement to refer to arbitration is in writing 30 C. 218. C

3.—“Any difference.”(1) *Future differences.*

The words “any difference” must be taken to embrace alike any present and future differences. 20 B. 232 (F.B.). D

(2) *Matter not cognizable by Civil Court—Agreement not to be accepted in part.*

A applied, under cl. 17 of the second Schedule to the Civ. Pro. Code, that an agreement for reference to arbitration between himself and certain other

3.—“Any difference”—(Concluded).

parties might be filed in Court, and that the agricultural land and certain cattle, belonging to the parties to the agreement, which related to the said land, be partitioned between the parties through the arbitrators.

Held, (1) that the Civil Court had no jurisdiction to entertain the application as it related to the partition of agricultural land, within the meaning, and for the purposes, of S. 158 (2), cl. (17) and (18) of the Punjab Land Revenue Act, 1887;

(2) that the agreement could not be accepted in part, i.e., as to the division of the cattle. 46 P.L.R. 1914=55 P.W.R. 1914=22 Ind. Cas. 381. E

4.—“Shall be referred to arbitration.”

Agreement must name arbitrators.

An agreement to refer must name the arbitrators. 20 B. 232. F

5.—“The parties....may apply.”

(1) **When legal representative may enforce contract to refer.**

Where the right dealt with in a reference survives on the death of a party, the legal representative of the party can enforce a contract to refer to arbitration. 27 M. 112. G

(2) **Failure to file agreement—Effect.**

(a) Although an award can be enforced by a separate suit, an agreement to refer to arbitration cannot be enforced at all, if not under this section. 22 M. 299. H

(b) Where a long time was allowed to elapse, without either party taking any steps to carry out an agreement to refer to arbitration, one of the parties was not debarred from prosecuting his suit. 1 N.W.P. 252. I

(3) **Court to inquire into factum of reference.**

Upon an application made to it, a Court has power and is bound to inquire into the question whether the parties had or had not referred the matter in question to arbitration. A.W.N. (1906), 136=28 A. 621. J

6.—“Clause 4.”

Construction.

The last clause of this section is not happily worded, nor does it adapt itself readily to, or fit in with, the provisions of its earlier clauses. It appears inferentially to give the parties power by agreement to nominate their arbitrator, even when they have agreed that their differences shall be referred to an arbitrator to be appointed by the Court. In such a case, the Court must appoint their nominee which is not unreasonable. This is the only mode of reading the section so as to make it harmonious throughout. 20 B. 232 (F.E.). K

7.—“Court shall order the agreement to be filed.”

(1) **Power of Court to file agreements to refer.**

(a) A general agreement to refer future differences to arbitration may be filed in Court. 20 B. 232. L

(b) A Court is bound, on the application of one of the parties, to file a voluntary submission to arbitration, and cannot permit the other party to withdraw from it arbitrarily and without good reason. 80 P.R. 1970. M

(c) An agreement to refer to arbitration, which includes matters beyond the jurisdiction of the Civil Court, cannot be filed in Court, unless the parties agree to do so with the view of proceeding with the reference. 5 P.R. 1889. N

7.—“Court shall order the agreement to be filed”—(Concluded).(2) **Agreement may be set aside on ground of mistake.**

An agreement to refer to arbitration might be set aside on the ground of mistake by the parties but an award cannot be so set aside. 3 C.P.L.R. 89. O

(3) **Appeal lies from an order refusing to file.**

An — an agreement to refer to arbitration. 11 O.C. 116; 89 P.R. 1901, *contra*; 5 A.H.C. 179; 3 A. 427; 5 A. 333=3 A.W.N. (1888) 56; 6 A. 186; 3 M.H.C. 188. P

(4) **Appeal does not lie from order disallowing objection.**

No appeal lies from an order disallowing an objection to the validity of a submission to arbitration. U.B.R. (1906), Civil Procedure, 52. Q

(5) **Proof of objections against filing the agreement.**

Mere allegation that the consent to an agreement to refer to arbitration had been obtained by fraud and misrepresentation is not a sufficient cause for not filing the agreement; the allegation must be proved. 49 P.R. 1893. R

(6) **Objection to validity of proceedings taken first in High Court.**

An objection that some of the arbitrators did not take part in the arbitration proceedings cannot be taken for the first time in the High Court. A. W.N. (1902) 195. S

*8.—“Court may appoint an arbitrator.”***Appointment of successor to arbitrator.**

The Court should hear the parties when appointing a successor to an arbitrator who has declined to act. 17 C. 200. T

Miscellaneous.(1) **Reference to effect partition—Order for sale, validity of.**

Where a reference empowered the arbitrators to make a partition, the Court could not order sale of the property though the award contained a recommendation to that effect. 3 C.L.R. 357. U

(2) **Award secured in proceedings under the section declared void—Suit to enforce award.**

When an award is secured in proceedings taken under the section and is declared to be void by the Court conducting such proceedings, a regular suit to enforce such award is not maintainable. 19 P.R. 1907=46 P.L.R. 1907. V

(3) **Filing of award.**

An award should be filed, though the reference was also at the instance of persons not parties to the suit. 4 B. 1. W

(4) **Acceptance of award by parties—Adjourning case for objections.**

A Court should not adjourn a case for objections, when both parties express their acceptance of an award. 15 P.R. 1899. X

(5) **Compromise amending award—Time for objection.**

The proceedings under r. 17 of Sch. II, Civ. Pro. Code (1908), can be compromised by amending the award, and the parties are entitled to get a decree based on the amended award.

Held, also, that there is no necessity to allow ten days for objections when the parties have accepted the award. 27 P.W.R. 1914=69 P.L.R. 1914=23 Ind. Cas. 591. X

18. Where any party to any agreement to refer to arbitration, or

Stay of suit where there is an agreement to refer to arbitration. any person claiming under him, institutes any suit 1 against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

(NOTES).

(1) Old Act.

This is a new provision.

Z

(2) Analogous law.

Compare S. 19 of the Indian Arbitration Act.

A

I.—“Where any party....institutes any suit.”

(1) Agreement to refer—Suit filed notwithstanding.

(a) Where a plaintiff, who had agreed to refer to arbitration a dispute between himself and the defendants, brought a suit against the latter in respect of that dispute, the plaintiff's suit should not be dismissed altogether, but the Court should allow the defendant reasonable opportunity for enforcing the agreement and should make an order staying the suit to enable him to take necessary steps. In case no steps are taken it should proceed with the trial of the suit in the ordinary manner. 12 A.L.J. 757=24 Ind. Cas. 490.

B

(b) The intention of the changes effected in the law by the enactment of cl. 18 of the second schedule to the Code of Civil Procedure, and the repeal of a portion of S. 21 of the Specific Relief Act effected by cl. 22 of the same schedule, appears sufficiently clear. A plaintiff in a case like the present is not debarred from bringing a regular suit upon his title. If he does so after having agreed to refer the matter to arbitration, the Court is bound to allow the party, who pleads this agreement as a bar to the suit, what it considers a reasonable opportunity of enforcing the agreement. If that party takes proper steps within reasonable time the regular suit will remain suspended while the arbitration proceedings continue, and if those proceedings eventuate in a decree of the Court, the suit would naturally be dismissed in the long run upon a finding that the matter in issue has been otherwise disposed of between the parties. If on the other hand, the defendants, after pleading the agreement to refer to arbitration as a bar to the plaintiff's suit, themselves neglect to take any action in respect of it within such time as the Court may prescribe, the presumption will be that, though they were ready to obstruct the plaintiff's suit by pleading the agreement, they are nevertheless as dissatisfied as the plaintiff himself evidently was with the agreement to refer to arbitration, and have no real desire or intention of getting that agreement enforced. In that case the

1.—“Where any party....institutes any suit”—{Continued}.

Court will hold that the agreement has become a dead letter, in view of the fact that neither party has any desire to enforce it, and it will proceed with the trial of the suit in the ordinary manner. 12 A.L.J. 757 (758). C

(2) Private reference to arbitration pending suit.

After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matters in difference between them to arbitration. The defendant then moved the Court to stay the suit. The lower Courts declined to do so. The defendant having applied to the High Court:

Held, dismissing the application, that the agreement did not fall under any of the clauses of the second schedule of the Civ. Pro. Code, 1908. 16 Bom. L.R. 658=88 B. 697. D

(2-a) Reference bar to further progress of suit.

Where, during the pendency of a suit, the parties, without the intervention of Court, refer the matter in dispute to arbitration, the reference is a bar to the further hearing of the suit. 4 A. 546=A.W.N. (1892) 185. E

(2-b) Instructions arbitration not bar to suit.

Where, in contemplation of a reference to arbitration, the parties agreed to withdraw a suit, and the arbitration became infructuous in consequence of the arbitrators declining to give a decision, there is nothing to prevent the institution of a fresh suit in respect of the same cause of action. 2 U.B.R. (1897-1901), p. 286. F

(3) Subsequent reference is no bar to suit.

(a) The previously instituted suit is not barred by reason only of an agreement being made between the parties for reference to arbitration without the intervention of the Court. 191 P.W.R. 1912. G

(b) An award made by an arbitrator in pursuance of such an agreement cannot be taken cognizance of by the Court so as to be made the basis of a proceeding under S. 525 of the Civ. Pro. Code, 1892. 191 P.W.R. 1912=15 Ind. Cas. 140=1912 P.L.R. Sup. 6=115 P.R. 1912. H

(4) Agreement to refer made a rule of Court.

An agreement to refer made out of Court during the pendency of a suit, and not made a rule of Court, is not a bar to the further progress of the suit, in the absence of a distinct agreement between the parties that the pending suit should be abandoned. 120 P.R. 1882. I

(5) A valid award concludes parties as to matter referred.

(a) A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. It possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties to the same subject-matter and it is binding upon the parties as embodying an adjudication of their rights. Per Mookerjee. 4 C.L.J. 162=33 C. 881. J

(b) A valid award concludes the parties from afterwards contesting in a suit the question referred and disposed of by the award. 11 C. 886 (P.C.)=12 I.A. 67; 2 Agra Rep. A.C. 224; 82 P.R. 1888; 118 P.R. 1890. K

I.—“Where any party...institutes any suit”—(Concluded).

(c) In *Bonnimes v. Heard*, (1879) L.R. 4 Q.B. 669, Lests, J. observed as follows:—“I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, and that the parties are not concluded by an award, that it is distinguishable from a judgment, which it is admitted would have bound the parties. The contention was that it was so distinguishable because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the Sovereign power within the realm. It is impossible to my mind to suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again and because it is expedient that there should be an end to litigation. When once a matter has been decided between the parties, the parties ought to be concluded by the adjudication whatever it may be. It is not a new doctrine that an award is a bar.” L

(6) Reference by unauthorised agent—Ratification by principal.

Where a principal is aware of the reference to arbitration on the application of his agent not authorised to do so, and tacitly ratifies the action of his agent in applying for such reference, he cannot then question the legality of the order of reference. 24 C. 469; see 8 O.C. 263; 7 C.W.N. 343; 9 M. 451. M

(7) Award does not bind strangers.

Mere silence on the part of a person, not a party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference cannot make the award binding on him; even though he might have produced some documents, through a servant, before the arbitrators, in obedience to a summons issued by them, and declined to produce others. 28 C. 303=5 C.W.N. 268. N

(8) Stranger cannot claim benefit under the award.

A stranger to the submission, being under no obligation to abide by the award, cannot avail himself of it. 6 A. 322=11 I.A. 20. O

19. The foregoing provision, so far as they are consistent with any agreement filed¹ under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph and to the award and to the decree following thereon.

(NOTES).**Old Act.**

This rule corresponds to S. 524 of Act XIV of 1882. P

*I.—“So far as they are consistent with any agreement filed.”***(1) Construction.**

The words “So far as they are consistent with any agreement filed” do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that the judge may act in conformity to it, and that S. 4, *supra*, has otherwise no application. The reasonable construction is that the action of

I.—“So far as they are consistent with any agreement filed”—(Concluded),
the judge under S. 4 should not be inconsistent with the agreement,
if it contains any special provision on the subject. This section should be
read as if it contained the words “in the absence of anything in the
agreement to the contrary the provisions of Ss. 4 to 16 are applicable.”
17 M. 498. Q

(2) Agreement not to appeal against decision of arbitrator.

A stipulation, in an agreement to submit to arbitration which was filed in
Court, that there should be no appeal against the decision of the arbitrator,
by either party, is not such as would prevent the Court from setting
aside the award on the ground of misconduct of the arbitrator. 6 M. 368. R

(3) Agreement not providing for difference of opinion—Appointment of umpire by
Court.

In an agreement to refer matters to arbitration, only two arbitrators were
named, and no provision was made for difference of opinion, by appointing
an umpire or otherwise. An application having been made for filing it
in Court, an order of reference was made by the Court. The arbitrators
not agreeing, an umpire was appointed by the Court on the application of
one of them. An award was eventually made, by the umpire and one of
the arbitrators, without the concurrence of the other, and submitted to
the Court which passed a decree in conformity with it. Held that the
Court could not provide for a difference of opinion between the arbitrators
under S. 4 and the other section preceding S. 17, for these sections are
applicable to cases coming under S. 17 only in so far as they are incon-
sistent with the agreement filed under that section. 8 A. 64=A.W.N.
(1886) 2. S

ARBITRATION WITHOUT THE INTERVENTION OF A COURT.

20. (1) Where any matter¹ has been referred to arbitration²

Filing award in without the intervention of a Court³ and an award
matter referred to has been made thereon⁴, any person interested in
arbitration without the award may apply⁵ to any Court having juris-
intervention of Court. diction⁶ over the subject-matter of the award that the
award be filed in Court.

(2) The application shall be in writing and shall be numbered and
registered as a suit between the applicant as plaintiff and the other parties
as defendants.

(3) The Court shall direct notice to be given to the parties to the
arbitration⁷, other than the applicant, requiring them to show cause,⁸
within a time specified⁹, why the award should not be filed.

(NOTES).

(1) Old Act.

This rule corresponds to S. 525 of Act XIV of 1893. T

(2) Scope of rule 20.

(a) This rule enables parties, who have agreed to refer their differences to arbit-
ration and have obtained an award, to have the award filed in Court.
27 A. 53=1 A.L.J. 398. U

(b) Rule 20 does not contemplate that an award should not be filed merely because it deals with *manpan*, that is, matter relating to a compliment or dignity for which the Civil Courts have no jurisdiction to entertain a suit. 15 Bom. L.R. 362. Y

(3) Object of the rule.

Rule 20 is devised for the purpose of enabling, where the subject-matter of the award lies within more than one jurisdiction, any Court within whose jurisdiction a part of the subject-matter lies to direct that the award be filed. 15 Bom. L.R. 362. W

1.—“Any matter.”

(1) Private arbitration in a pending suit.

See 4 B. 1; 26 B. 76; 8 Bom. L.R. 777; 24 C. 908; 24 M. 326; 23 M.L.J. 290=12 M.L.T. 133=(1912) M.W.N. 1091; 30 C. 218=7 C.W.N. 180; 115 P.R. 1912; 27 A. 53 noted under r. 17, *supra*. See, also, 38 B. 687 =16 Bom. L.R. 658. X

(3) Arbitration of disputes about *manpans*.

Dispute about *manpan* which cannot be settled in the Courts can often be effectively settled by arbitration. 15 Bom. L.R. 362. Y

(3) Agreement for distribution of cash allowance received from Government.

The parties are at liberty without in any way going against the words or the spirit of the Pensions Act, 1871, to agree amongst themselves that when the cash allowance is received from Government it shall be distributed amongst them in a certain way. Such an arrangement embodied in an award can be filed in Court. 15 Bom. L.R. 362. Z

2.—“Has been referred to arbitration.”

(1) Agreement to refer—Writing, necessity for.

(a) An agreement to refer need not be reduced to writing. 18 W.R. 538; W.R. (1864) 76. A

(b) A verbal submission to arbitration, as a result of which title to immoveable property is likely to be affected, is valid. 14 O.L.J. 188. B

(2) Power of certain person to refer for others.

See notes under r. 1. C

3.—“Without the intervention of a Court.”

(1) Factum of reference, which Court to determine.

The question whether a certain matter had been referred to arbitration and an award had been made thereon ought to be decided by the Court to which the application for filing the award was made. 29 B. 621=7 Bom. L.R. 644; when it is disputed by any party, 17 A. 21; 28 A. 621; 20 M. 89; *contra*, the matter must be left to a regular suit. 9 B. 354; 20 B. 596. D

(2) Securing attendance of witnesses before private arbitrators.

There is no provision of law which would enable private arbitrators to secure the attendance of persons before them for the purpose of giving evidence, and the duties of such arbitrators do not go further than to examine the persons produced before them by the parties to give evidence. 7 Ind. Cas. 388. E

4.—“An award has been made thereon.”**(1) Award necessary to give Court jurisdiction.**

In order to set the Court in motion, and to establish the jurisdiction, there must have been a private reference to arbitration, and there must have been an award made, which is sought to be filed in Court. W.R.F.B. 9. F

(2) Recommendation by arbitrator is no award.

A document signed by an arbitrator which merely recommends a solution of the question referred cannot be treated as an award under this section. 11 C. 356. G

(3) Valuation arrived at by valuers is no award.

If there was no matter in difference between the parties which could be referred to arbitration, the valuation made by three persons appointed by the plaintiff was not an award within the meaning of this section. 30 C. 881. H

5.—“Any person....may apply.”**(1) Who may apply.**

- (a) Any person interested in an award, though not a party to the reference, may apply to have the award filed in Court. 5 W.R. 128. I
- (b) But a stranger to a submission to an arbitration cannot take advantage of the points favourable to him in the award. 2 A. 809 ; 6 A. 322. J

(1-a) Compromise by parties pending reference—Application to file.

The parties after appointing arbitrators settled their differences independently of the arbitrators and drew up a deed in the form of a compromise. It was signed by the parties and the arbitrators.

Held, that the deed could not be treated as an award and an application to file it in Court as an award could not be granted. 48 P.L.R. 1915=28 Ind. Cas. 298. K

(2) Reference by some of the parties.

An award on a private reference, made by some of the plaintiffs and the defendants, is binding on the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it. 10 C.L.J. 41=2 Ind. Cas. 414=37 C. 63=14 C.W.N. 75. L

(3) Form of application.

An application to file an award may be made without any valuation of suit. 14 W.R. 255. M

(4) Mode of enforcement of award.

- (a) Proceedings described as a suit and registered as such must be taken, in order to bring the award under the cognizance of the Court. 6 C.W.N. 226=29 C. 167. N
- (b) Where sufficient cause is shown why an award should not be filed, the party concerned must be left to bring a regular suit for the enforcement of the award. 1 A. 156. O

(5) Proof of lost award.

Secondary evidence of an award is admissible if it has been lost. 15 M. 99. P

(6) Withdrawal of applicant from arbitration proceedings.

An applicant for filing an award in Court can, at any stage of the hearing prior to the delivery of judgment and preparation of the decree, withdraw from the proceedings. 31 C. 516. Q

(b) Rule 20 does not contemplate that an award should not be filed merely because it deals with *manpan*, that is, matter relating to a compliment or dignity for which the Civil Courts have no jurisdiction to entertain a suit. 15 Bom. L.R. 362. V

(2) Object of the rule.

Rule 20 is devised for the purpose of enabling, where the subject-matter of the award lies within more than one jurisdiction, any Court within whose jurisdiction a part of the subject-matter lies to direct that the award be filed. 15 Bom. L.R. 362. W

1.—“Any matter.”

(1) Private arbitration in a pending suit.

See 4 B. 1; 26 B. 76; 8 Bom. L.R. 777; 24 C. 903; 24 M. 326; 23 M.L.J. 290=12 M.L.T. 188=(1912) M.W.N. 1091; 30 C. 218=7 C.W.N. 180; 115 P.R. 1912; 27 A. 53 noted under r. 17, *supra*. See, also, 38 B. 687 = 16 Bom. L.R. 653. X

(2) Arbitration of disputes about *manpans*.

Dispute about *manpan* which cannot be settled in the Courts can often be effectively settled by arbitration. 15 Bom. L.R. 362. Y

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An application to file an award may be made without any valuation of suit. 14 W.R. 255. M

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Secondary evidence of an award is admissible if it has been lost. 15 M. 99. P

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An applicant for filing an award in Court can, at any stage of the hearing prior to the delivery of judgment and preparation of the decree, withdraw from the proceedings. 31 C. 516. Q

5.—“Any person....may apply”—(Concluded).

(7) Application re award determining extraneous matters.

An application to file a private award determining matters not referred to cannot be maintained. 8 A. 541. R

(8) Distinction between granting and not granting application.

The distinction between cases when an application to file an award is allowed and when it is not, is that, in the former, the Court shows itself satisfied with the regularity of the submission to arbitration, and, in the latter, it does not. 10 C.W.N. 601. S

(9) Plea of limitation when reference falls through.

A plea of limitation can be raised when a reference to arbitration falls through. 9 N.W.P. 177. T

N.B.—For further cases, see notes under the next rule.

6.—“To any Court having jurisdiction.”

(1) Jurisdiction of Small Cause Court to receive application.

A Court of Small Causes in the mofussil has a right to receive an application to file a private award, provided the subject-matter is otherwise cognizable by it. 1 B.L.R.A.C. 43=10 W.R. 85; 10 B.H.C. 54. U

(2) Power of Court to amend or remit private award.

(a) A Court has no power to amend a private award or remit it for re-consideration, but must either affirm it in its entirety or wholly reject it. 84 P.R. 1907; 10 B.H.C. 391; 9 B. 82; see, also, 27 A. 526=A.W.N. (1906) 86=2 A.L.J. 416; 6 B. 669; 7 C. 490; 3 A. 286. V

(b) An award cannot be remitted for re-consideration after judgment has been passed on it. 2 N.W.P. 235. W

7.—“Parties to the arbitration.”

Application by persons not actually before arbitrators.

The word “parties” as used in this section cannot be construed so as to apply only to persons who are actually before the arbitrators. If parties, by an agreement, have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed, which, under one state of circumstances, may be adopted *in invitum*, then, for the purpose of this section, they should be regarded as parties to the arbitration. *Willcox v. Storkey*, L.R. 1 C.P. 671; *Re Newton and Hetherington*, 19 C.B. (N.S.) 342; 8 A. 340=A.W.N. (1886) 107. X

8.—“Show cause.”

“Show cause,” meaning of.

The words “show cause” this in section do not mean simply putting in a verified petition of objections. The party opposing the filing of the award must show sufficient cause, that is to say, must establish by argument, or proof, or both, reasonable ground for the conclusion that the award is open to any of the objections mentioned in Ss. 14 and 15, *supra*. This section and S. 21 should be read together. 8 A. 340=A.W.N. (1886) 107. Y

9.—“Within a time specified.”

Appeal for not allowing time to file objections.

An appeal lies from a decree passed on an award, without allowing time to the parties to file objections thereto. 29 A. 584=A.W.N. (1907) 184=4 A.L.J. 450. Z

Court Fees.

(1) Suit for specific performance of an award.

A—ought to be stamped according to the amount or value of the property in dispute. See Court Fees Act, S. 7, X (d). A

(2) Suit for possession of land in terms of an award.

A claim for possession of land in terms of an award is chargeable under S. 7, Cl. X(d) of the Court Fees Act. Oudh S.C. 32. B

(3) Suit to file and enforce decisions of the Thathanabaing—Decision ejecting defendant from monastery.

Plaintiffs alleged that, on a dispute between them and the defendants, with reference to the defendant's occupation of a certain monastery, a decision ejecting him was made under the authority of the *Thathanabaing* and his council. Plaintiffs attached the decision to the plaint and they prayed that it might be “filed and enforced.” Hold that, in the absence of the particulars necessary to bring the plaint under S. 525, Civ. Pro. Code, 1882, the suit must be regarded as a suit for the specific performance of an award and that the Court-fee was payable *ad valorem* on the value of the property sought to be recovered. U.B.R. 1909, 2nd Quarter, Buddhist Law, (Ecclesiastical) 5. C

(4) Suit to set aside an award.

Plaint or memorandum of appeal in a suit to set aside an award ought to bear a Court-fee of Rs. 10. See Court Fees Act, Sch. II, Art. 17 (iv). D

(5) Suits dealing with arbitration awards.

In suits to set aside summary decisions, as also in those dealing with arbitration awards, the amount of Court-fee payable on the plaint does not depend upon the value of the suit. 7 C.L.J. 86 (P.C.)=35 C. 202=35 I.A. 22=12 C.W.N. 169=5 A.L.J. 10=17 M.L.J. 618=2 M.L.T. 506=10 Bom. L.R. 1. E

(6) Application to file an award.

The proper Court-fee on an application to file an award under S. 525 of C.P.C., 1882, is that prescribed for applications, and not the fee upon a plaint. 10 C. 11; 18 C.L.R. 171. F

(7) Appeal against order directing an award to be filed.

An appeal from an order directing an award made on a reference to arbitration without the intervention of a Court to be filed ought to bear an *ad valorem* fee calculated on the amount decreed to be recoverable. 38 C. 11. See 9 Bom. L.R. 259; 3 B.L.R. App. 104. G

(8) Appeal against an order rejecting an award to be filed.

A memorandum of appeal against an order rejecting an application to file an award under S. 525, C.P.C., 1882, is chargeable with a Court-fee of Rs. 10 under Art. 17, Sch. II of the Court Fees Act. 84 P.R. 1907=184 P.L.R. 1908; A.W.N. (1908) 214. But see 109 P.L.R. 1903; 70 P.R. 1881. H

9.—“*Within a time specified*”—(Concluded).

Court Fees—(Concluded).

- (3) Application for revision against order rejecting objections to an award and passing decree in accordance with award.

An—chargeable with *ad valorem* Court-fee under Art. 13, Sch. I of the Court Fees Act when the subject-matter of the case exceeds Rs. 25. The fact that no decree was framed at the date of making the application does not affect the question of Court-fee. 4 P.L.R. 1911=9 Ind. Cas. 388=13 P.W.R. 1911. I

21. (1) Where the Court is satisfied that the matter has been referred ¹ to arbitration and that an award has been made ² thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 ³ is proved ⁴, the Court shall order the award to be filed ⁵ and shall proceed to pronounce judgment according to the award ⁶.

(2) Upon the judgment so pronounced a decree shall follow ⁷, and no appeal shall lie from such decree ⁸ except in so far as the decree is in excess of or not in accordance with the award.

(NOTES).

(1) Old Act.

This rule corresponds to S. 526 of Act XIV of 1882. J

(2) Rule not exhaustive.

This rule is not exhaustive. 11 C.L.J. 181=5 Ind. Cas. 95. K

(3) Rule applies only to existing disputes.

Under para. 21 (1) of Sch. II, Civ. Pro. Code, 1908, the Court must satisfy itself that there was a matter in difference between the parties existing at the time of the reference to the arbitration, before it passes a decree on an award. 5 S.L.R. 92. L

(4) Reference to arbitration without intervention of Court by parties to suit—Procedure for filing award.

Where a suit is referred by the parties to arbitration without the intervention of the Court and an award is made, the party who wishes to enforce the award should apply to the Court and prove to its satisfaction that the adjustment which he sets up was justly, legally and properly arrived at. 15 Bom. L.R. 340. M

1.—“*Satisfied that the matter has been referred*.”

Objection as to factum of reference—Duty of Court.

Where the filing of a private award is objected to on the ground that there was no reference to arbitration, the Court has power to determine the genuineness of the reference and validity of the award. 16 M.L.J. 174. It is bound to do so. 184 P.R. 1888. N

2.—“*Award has been made*.”

(1) Award, what is an.

Separate papers, severally stating the opinions of several arbitrators in a suit, and signed and delivered by them severally in Court, do not constitute an award. The award should be a complete document signed by the arbitrators conjointly and in the presence of each other. 12 W.R. 397. O

2.—“Award has been made”—(Concluded).

(2) Award, construction of.

(a) In India, an award should be construed in accordance with what may reasonably be supposed, under the circumstances of the case, to have been the intention of the arbitrator. 20 A. 245. P

(b) The principles which would apply in the construction of an award settled by counsel or a solicitor in England should not be applied in construing an award drawn up by an unprofessional arbitrator in India. 20 A. 245= A.W.N. (1898) 34. Q

3.—“Ground mentioned or referred to in paragraph 14 or paragraph 15.”

(1) Objection to award.

The Court, when invited to enforce the award, is not limited to the ground, mentioned in rules 14 and 15, *supra*. 25 C. 757; 20 M. 89; 17 A. 21; 22 A. 224; 11 O.L.J. 131=5 Ind. Cas. 98. R

(2) Objection to jurisdiction and vagueness of agreement.

Assuming that, in a proceeding under rules 20 and 21, the Court has power to consider such objections as are mentioned in rule 14 or 15, an objection that the value of the property in suit was Rs. 500 only and that therefore the application should have been made in the Munsif's Court, and not in that of the Subordinate Judge, or an objection that the agreement of submission is vague and indefinite and does not clearly set out the matters in dispute, does not fall under either rule. 16 C. 482. S

(3) Objections to a private award—Opportunity to produce evidence.

Where, to an application to file a private award made under rule 20, the defendant raises objections referred to in rules 14 and 15, the Court is bound to allow the defendant opportunity to produce evidence to substantiate his objections. Where the Court, after examining one of the arbitrators, summarily dismissed the plaintiff's application, the Chief Court set aside the order of dismissal and remanded the case for fresh decision after examining witnesses for the defendant. The Chief Court observed that the Civil Courts have no power to sit as Courts of appeal to consider the correctness of awards on the merits, in respect of matters of fact and even of law. They cannot usurp the functions of the arbitrators, when once the parties have made up their minds to have recourse to arbitration. 53 P.L.R. 1909=64 P.W.R. 1909=4 Ind.Cas. 553. T

(4) Further conditions than those mentioned in the section cannot be imposed.

The new Civil Procedure Code having fixed the conditions clearly and reasonably in Sch. II, para. 21, cl. (1), Courts cannot refuse to file awards by imposing further conditions than those mentioned therein. The words of the statute law are imperative. (1916) M.W.N. 203=19 M.L.T. 228. U

(5) Points for consideration in proceedings under this rule.

In proceedings under paras. 20 and 21 of Sch. II of Act V of 1908, the only points for consideration are : (1) Whether or not the matter has been referred to arbitration. (2) Whether or not an award has been made. (3) Whether or not any ground sue has is mentioned or referred to in para. 14 or 15 is proved. 11 P.W.R. 1914=31 P.L.R. 1914=30 P.R. 1914= 23 Ind. Cas. 422. V

4.—“Is proved.”

- (1) Party wishing to enforce an award should prove its legality.

Where a suit is referred by the parties to arbitration without the intervention of the Court and an award is made, the party who wishes to enforce the award should apply to the Court and prove to its satisfaction that the adjustment which he sets up was justly, legally and properly arrived at. 15 Bom. L.R. 340. W

- (2) Necessity for proof of objections to filing of award.

- (a) Where an objection was raised that an award was sham and fraudulent, meaning thereby that there was corruption and misconduct on the part of the arbitrator, the Court was bound to investigate the objection. 7 Bom. L.R. 738; 17 A. 21=A.W.N. (1894) 187; there must be proof of allegations made. 28 B. 287. X
- (b) The party opposing the filing of an award must adduce evidence in support of his objection. 8 A. 240=A.W.N. (1886) 107. Y

5.—“The Court shall order the award to be filed.”

- (1) Validity of award on reference by Hindu father.

The father of a joint Hindu family has authority to refer to arbitration the partition of the joint family property, and an award, when properly made, is binding on the sons. 16 A. 231=A.W.N. (1894) 60. Z

- (2) Award not according to the law agreed to by parties.

It was provided in a reference to arbitration that the dispute should be decided according to Muhammadan Law; the arbitrators, however, did not profess to decide the matter according to Muhammadan Law, and their decision was contrary to the well-known rules of that law: Held, that the decision of the arbitrators was perverse. 14 Ind. Cas. 978. A

- (3) Award not referring to abandoned claim.

Held per Sundara Iyer, J.—If a claim was given up before the arbitrators, the award would not be vitiated by the non-reference to such claim. (1912) M. W.N. 1076. B

- (4) Award relating to property outside Court's jurisdiction.

Where the submission to arbitration as well as the making of the award took place within the jurisdiction of the Court, it did not matter that the award related to property, part of which was outside the Court's jurisdiction. 24 M. 31. C

- (4-a) Order directing award to be filed invalid—Decree if valid.

The decree based upon the award is no doubt final, if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed, and if the latter is set aside, the decree must be declared inoperative. 18 C.W.N. 381=22 Ind. Cas. 391. D

- (5) Award on matters not referred to arbitration.

(a) Where a private award determines matters not referred to arbitration, an application under this section for filing such award is liable to be dismissed. 8 A. 541; 29 M. 303. E

(b) A private award, that is, one made on a reference out of Court, is bad, if it decides questions not referred to the arbitrators and leaves undecided questions which they were authorised to decide. *In re Morphett*, 2 D. & L. 967=14 L.J.Q.B. 259=10 Jur. 546; 19 Ind. Cas. 941. F

5.—“*The Court shall order the award to be filed*”—(Continued).

(c) A private award determining matters not referred to arbitration cannot be filed in Court, and no decree can be based thereon even if these matters are separable from the rest of the award. 30 P.R. 1914=23 Ind. Cas. 422. G

(6) Award not determining matters referred to.

An award which does not determine one of the principal subjects of dispute should not be filed in Court. 6 B. 663. H

(7) Award made after receipt of notice of revocation.

An award made by the arbitrator after receipt of notice of revocation, given on valid grounds, is invalid on the ground of judicial misconduct and cannot be enforced by suit. 29 C. 278. I

(8) Partial award cannot be filed.

(a) The award in order to be filed in Court must be complete in itself. 21 W.R. 182. I-1

(b) It is not competent to the Court, in a proceeding under S. 525 of the Code of 1882, to direct that the award be filed in part; the Court is bound to refuse an application made to it for filing the award, if in its opinion the award is open to attack in part. 15 C.L.J. 110. J

(9) Provisional award cannot be filed.

An award which is provisional, that is to say, which does not completely and once for all determine the dispute between the parties cannot be filed under rule 20 and it cannot be made rule of the Court. The appointment of a Receiver during proceedings started upon such an award is illegal. 6 A.L.J. 467=2 Ind. Cas. 304. K

(10) Award on matters partly within and partly without submission.

(a) An award in which the invalid portions are independent of, and separable from, the valid portions, if enforceable at all, cannot be enforced by summary procedure under this section. 3 M. 68. L

(b) If an award is open to objection in material particulars, the entire award must be deemed null and void. *Duke of Buccleuch v. Metropolitan Board of Works*, L.R. 5 Ex. 221 at p. 229=39 L.J. Ex. 130 at p. 136; 10 Ind. Cas. 450=18 C.L.J. 399; 11 Ind. Cas. 481=14 C.L.J. 188; 19 Ind. Cas. 941. M

(11) Indefinite award incapable of execution cannot be filed.

An award which is so indefinite as to be incapable of execution as a decree of Court cannot be filed under this section. 70 P.R. 1881; 77 P.R. 1882; 29 M. 303. N

(12) Power of Court to file a defective private award.

Where the arbitrators appointed under an agreement between the parties made an award which was defective, held that the Court had no power to file the award. 84 P.R. 1907. O

(13) Arbitrator not taking steps to secure attendance of witnesses.

An award made by a private arbitrator, without taking any steps to secure the attendance of witnesses before him, when he had undertaken to do so, is not valid. 2 U.B.R. (1897-1901), p. 4. P

(14) Duty of Court to enter into the merits of the award.

It is no part of the duty of the Court acting under rule 20, to enter into the merits of the award. 7 Ind. Cas. 393. Q

5.—“*The Court shall order the award to be filed*”.—(Continued).

(15) Arbitrator exceeding powers given.

Where, in a reference without the intervention of Court, the arbitrators exceeded the powers given to them under the agreement, the Court had no power to file the award. 84 P.R. 1907. R

(16) Agreement opposed to public policy.

This rule does not affect the inherent jurisdiction of the Court to decide a fundamental objection which goes to the root of the matter, e.g., that the agreement, on which the award is based, was against public policy and not therefore enforceable in a Court of Justice. 11 C.L.J. 181=5 Ind. Cas. 98. S

(17) Award on reference in criminal proceedings.

An award made upon a reference in criminal proceedings has the same effect as an award made on reference in civil proceedings. 6 A.W.N. 158. T

(18) Award providing compensation for seduction of girl.

There being no authority for the view that arbitrators can take cognizance only of claims in respect of which the regular Courts will give relief, a Court can file an award providing for the payment of compensation for the seduction of a girl. U B.R. (1908), 2nd Quarter, Civ. Pro. 19. U

(19) Object of reference being to stifle criminal prosecution.

(a) The same transaction may give rise to a civil as also to a criminal liability, and a reference to arbitration for the settlement of the civil dispute alone would be valid, but not if the object of the reference was to stifle a criminal prosecution also. 11 C.L.J. 181=5 Ind. Cas. 98. See 11 B. 566; 22 A. 924; 28 A. 719; 9 P.R. 1906. Y

(b) But in order to make the award invalid, it is essential for the defendant to prove that the criminal prosecution stifled was for a non-compoundable offence, that is, for an offence of a character, the compromise of which is regarded by the Criminal Code as forbidden by law or against public policy. 11 C.L.J. 181=5 Ind. Cas. 98. W

(20) Application to file award—Award and consent to arbitration disputed—Procedure.

If the award and the consent to arbitration is substantially disputed, the Special Jurisdiction created by Ss. 20 and 21 is ousted, and the applicant must be referred to a regular suit. A decree passed upon the award under such circumstances will therefore be open to appeal. 18 M. 428 (F.B.). X

(21) Award not an agreement but a judgment.

(a) An award is not a mere agreement but is equivalent to a judgment. It is binding between the parties in all matters which it professes to decide. When once a matter has been decided between the parties, the parties ought to be concluded by an adjudication whatever it may be. 11 Bom. L.R. 20=5 M.L.T. 226=1 Ind. Cas. 105. Y

(b) An award duly passed in accordance with the submission of the parties is equivalent to a final judgment. To give effect to it, the subsequent consent or approval of neither party is required. In order that the parties should be remitted to their previous rights, there must be positive evidence that both parties agreed that the former state of things should be restored. It is not enough that the award was not enforced or that even both the parties objected to it. 19 M. 290; 20 M. 490; 33 C. 881; 11 Bom. L.R. 20=5 M.L.T. 220; 1 S.L.R. 295. Z

5.—“The Court shall order the award to be filed”—(Continued).

(22) Necessity for enforcement of award.

Where an award is valid, it is operative even though neither party has sought to enforce it by regular suit or by the summary procedure. 33 C. 881=4 C. L.J. 162; 7 O.O. 369; it is not necessary that the award should be made a rule of Court. 6 A. 28=8 A.W.N. 237=4 A.W.N. 148; 12 A.W.N. 238. A

(22-a) Remission of private award.

There is no provision for remitting to the arbitrators an award made in arbitration without the intervention of a Court. 21 Ind. Cas. 182. B

(23) Refusal to file award—Separate suit.

(a) The refusal of an application for the filing of an award under this section merely leaves the award to have its ordinary legal validity; and it may be relied on as a defence in a suit relating to the subject matter dealt with by it, although an application to file the award has not been granted. 18 C. 414 (P.C.)=18 I.A. 73; 8 M.H.C. 81; 11 P.W.R. 1910=34 P.R. 1910 =5 Ind. Cas. 597=188 P.L.R. 1910. C

(b) Thus, where separable claims, namely a claim to share property by right of inheritance, and a claim for the office of lambardar, had been disposed of, on a reference by the parties without the intervention of a Court, by the award of an arbitrator, and an application under this section has been rejected, for the reason, among others, that the claim for the office of lambardar, is not a matter of Civil Jurisdiction, a suit subsequently brought basing on the claim to share property by right of inheritance will be barred by the award. 18 C. 414. D

(24) Order refusing to file whether *res judicata*.

(a) An order refusing to file a private award is not a decision as to the validity of the award, so as to make the rule of *res judicata* applicable to it. 70 P.R. 1891. E

(b) An order of a Court refusing to file an award does not operate as *res judicata* in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. 8 A.L.J. 815; 18 M. 428 (F.B.). F

(c) In order to make the refusal to file the award a binding judgment against its validity, on a particular ground, it is necessary to show that that point was definitely raised and put in issue and made the subject of trial. 16 C. 414 (P.C.)=18 I.A. 73; 21 B. 465; see, also, 7 C. 727=9 C.L.R. 877. G

(d) Where the grounds on which the second suit is based had previously been substantially raised and determined in the proceedings taken under S. 525, Civ. Pro. Code (1882), on an application to file the award, the second suit will be barred. 9 Bom. L.R. 259. See, also, 29 C. 167; 32 C. 11; 29 M. 38. H

(e) Thus where a party objected to the filing of an award on the ground that the arbitrator has made a fraudulent award after the party had revoked his submission, and that he had anticipated the award for that purpose, and the objections were overruled, it was held that he could not institute a separate suit to annul the award. 20 M. 89=7 M.L.J. 61. I

(25) Application to file award—Power of Court to set aside award.

On an application made under this section to file a private award, the Court can only refuse to file the award if there are grounds specified in Ss. 14 and 15, *supra*; but it has no jurisdiction to set aside the award. 19 M.L.J. 275. J

5.—“*The Court shall order the award to be filed*”—(Continued).

(26) Award bar to suit.

A private award is a bar to a suit upon the same cause of action, 113 P.R. 1890; or in respect of the same matter. 18 O. 414=18 I.A. 73. K

(26-a) Award, whether a bar to an action on the original demand.

A valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure. An award extinguishes all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from S. 21 of the Specific Relief Act, which to some extent is replaced by para. 18 of the Second Schedule of the Civ. Pro. Code. 25 Ind. Cas. 220=7 Bur. L.T. 308. L

(26-b) Original cause of action, plaintiff, whether can fall back upon, when award held to be invalid.

(a) A valid and enforceable award made without the intervention of the Court bars a suit on the original cause of action. 68 P.W.R. 1916. M

(b) Therefore, where a plaintiff alleges that an award made out of Court is invalid but seeks its enforcement if the Court finds it to be valid, or in the alternative prays for a decree on the original cause of action in case the award is found to be invalid, it is the duty of the Court to determine the validity of the award and to pass a decree in its terms if it is found to be valid, or to adjudicate upon the original cause of action if it is found to be invalid. (*Ibid.*) N

(27) Suit lies to enforce award.

(a) A suit will lie to enforce an award. 7 W.R. 269; 9 W.R. 441; 20 W.R. 420; 4 M.H.C. 119; 15 M. 99; 19 M. 290; 20 M. 490; 22 M. 299; 7 O.C. 369; U.B.R. (1906) 80; 2 U.B.R. (1897-1901), p. 10. O

(b) But in 21 C. 213, Ghose, J., observed as follows :—

“I doubt in the first place whether a separate suit would lie to enforce an award if the application to file it can be dealt with under S. 526 (Act XIV of 1882), and if it has been refused, though no doubt a suit being brought upon the original right, the award may be referred to as evidence in support of that right. But however that may be (and it is perhaps unnecessary to express any opinion upon that question in this case), I do not see why, if the Legislature has provided a procedure under Ss. 525 and 526 to enforce an award, the parties should be driven to another suit.” See also 19 P.R. 1907. P

(c) A suit lies on an award, even though the same has not been filed in Court within six months as required by S. 2, para. 20, Civ. Pro. Code. 2 L.W. 320=17 M.L.T. 241=29 Ind. Cas. 49. Q

(d) An award is not in the nature of a foreign judgment and a Court is, therefore, entitled to go into the merits of the same. 2 L.W. 320=17 M.L.T. 241. R

(27-a) Suit to enforce award—Jurisdiction.

A suit to enforce an award is not the same as a suit to enforce a contract; and the Small Cause Court has jurisdiction to take cognizance of such a suit. 25 Ind. Cas. 826. S

5.—“The Court shall order the award to be filed”—(Continued).

(28) Suit on award when not valid in law.

Where the arbitrators exceed their powers, a suit based upon their award is not maintainable. 7 N.W.P. 329. T

(29) Suit on award is not a suit for specific performance.

(a) A suit for recovery of money, payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by Art. 116 or Art. 120 of the Limitation Act. 8 A.L.J. 1138; 15 C.P.L.R. 115. U

(b) S. 30 of the Specific Relief Act lays down that, when the question is one of specific performance, the Court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question is to take the terms of the award before the Court and to see whether, if the same terms had been embodied in a contract between the parties, the suit is or is not one in which specific performance of those terms is claimed and ought to be decreed. 8 A.L.J. 1138. V

(30) Application to file award—Suit on award—Difference.

The difference between the two proceedings is:—(a) An award can only be filed, as the result of a summary proceeding, provided that it is free from each and all of the defects under S. 520, Civ. Pro. Code (=cls. 14 and 15 of Sch. II to Act V of 1908), and it can only be so filed within six months of its being given. (b) A suit, however, can be well based upon a defective award, the Court having power to rectify its defects—and it can of course be brought at any period which the law for the limitation of suits permits. 11 P.W.R. 1910=84 P.R. 1910=5 Ind. Cas. 597=183 P.L.R. 1910. W

(31) Effect of an award to transfer property.

An arbitrator cannot by his award transfer an interest in lands from one to another, whether the submission be by deed or not; nor can he make partition of land between tenants-in-common by his award, for the land will not pass by it, but he must direct the parties to execute conveyances to each other of the allotted portions. Russel, 9th Ed., p. 811; 17 O.C. 108, X

(31-a) Award not filed in Court—Deed of conveyance not executed—Title to property.

The title of persons entitled to a property under an award of arbitrators cannot be impugned because the award has not been filed in Court or because no deed of conveyance has been executed to give effect to its terms. 32 Ind. Cas. 465; 18 O.C. 282. Y

(31-b) Effect of valid award.

A valid award operates to merge and extinguish all claims embraced in the submission and, after it has been made, the submission and award furnish the only basis on which the rights of the parties may be determined; such an award is operative even though neither party sought to enforce it by suit or application. 156 P.W.R. 1913=20 Ind. Cas. 185=275 P.L.R. 1913. Z

5.—“*The Court shall order the award to be filed*”—(Continued).

(32) Conveyance in pursuance of an award is not an alienation.

Where subsequent to the passing of an award directing the execution of a deed of conveyance of certain immovable property such property is attached in execution of a decree, the execution of the conveyance in pursuance of the decretal order passed by the Court in accordance with the award subsequent to the attachment is not a private alienation of such property which would be void as against a claim enforceable under the attachment. 4 A. 219 = 2 A.W.N. 17 ; see 22 P.L.R. 1905 ; 8 M.L.T. 197 = 7 Ind. Cas. 795. A

(33) Result of filing award.

When the award is filed, the result is not that there is a *suit* in which a decree has been passed, but that there is an award, which shall be enforceable as though it were a decree. 40 C. 219 ; 12 Bom. L.R. 860. B

(34) Suit to set aside decree based on award.

A separate suit will not lie to set aside a decree based on an award merely on the ground that it was obtained by fraud. The only remedy open to plaintiff lies through a review. 98 P.R. 1915 = 179 P.W.R. 1915. C

A.—Limitation.

(1) Application to file an award—Limitation.

(a) Article 178 of the Indian Limitation Act (IX of 1908) provides that an application for the filing in Court of an award in a suit made in any matter, referred to arbitration by order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court, should be made within six months from the date of the award. D

(b) In the case of an award given by arbitrators on an arbitration without the intervention of a Court, the date from which limitation begins to run is not the date which the award bears, but the date on which it is given to the parties by the arbitrators. 9 C. 575. E

(c) The filing in Court of an award by an arbitrator under rule 10, *supra*, is not an application to file an award within the meaning of the said article. 7 C. 388. F

(2) Filing in Court—What amounts to.

An award was completed and signed and left with the peon of the Court on the last day fixed by the Court. Held, that the award was made within time, although it did not reach the hands of the Court until the next day. 26 A. 105. G

(2-a) Presenting the award is not submission of the award.

Held, that presenting an award without the knowledge of the parties before the date fixed for its filing is *not submission of the award to the Court* within the meaning of Art. 158 of Act IX of 1908. Such submission is to be considered to have taken place on the latter date and it is from this date that the period of ten days for filing the objection begins to run. 14 P.W.R. 1916. H

Held, also, that if the ten days time expires on the date when the Court is closed, the objections can be filed on the first day on which the Court re-opens. 14 P.W.R. 1916. I

5.—“The Court shall order the award to be filed”—(Continued).

A.—Limitation—(Continued).

(3) Suit to recover immoveable property under award—Limitation.

- (a) A suit, to recover immoveable property under an award is governed, either by Art. 144 of the Limitation Act as being a suit for possession of immoveable property, or by Art. 120, as being a suit to enforce an award for which no special period is prescribed by the schedule. 10 M.L.J. 208; 2 U.B.R. (1897–1901), 446. J
- (b) A suit for possession of immoveable property, on declaration of plaintiffs' right thereto, on the basis of their purchase of the same, or in the alternative, on the basis of an award made by an arbitrator appointed by the parties, cannot be regarded as a suit for the specific performance of a contract within the meaning of Art. 118 of the Limitation Act. 4 C.L.J. 162=33 C. 881; see, also, 23 M. 593; 23 A. 285; 5 A. 268; 16 A. 3. K
- (c) Such a suit cannot be regarded as an application or a suit to enforce an award and neither Art. 181 nor Art. 12G of the Limitation Act is applicable to it. 4 C.L.J. 162=33 C. 881. L
- (d) Such a suit is governed by Art. 144 of the Act and may be brought within twelve years from the date of the award. *Per Rampini, J.*, in 4 C.L.J. 162=33 C. 881. M
- (e) Such a suit is governed by either Art. 142 or Art. 144 of the Limitation Act. *Per Mookerjee, J.*, in 4 C.L.J. 162=33 C. 881. N
- (f) If an award of arbitration grants possession, and neither of the parties were in possession at that date, a suit by the person in whose favour the award is passed for possession against a stranger in possession for more than twelve years would be barred, though it is within twelve years from the award. 1 A.W.N. 70. O
- (g) Where, in a suit for a share of land alleged to be ancestral estate, it was found that the defendants were in adverse possession of it for about thirty years, but that an award had been made eleven years before suit giving the plaintiff a share therein, the award would not save limitation, since it was not followed by possession. U.B.R. (1892–96), 481. P
- (h) The limitation for a suit to recover possession of certain property covered by an award brought about by coercion and undue influence, which award dispossessed plaintiff, would be three years, whether the award be treated as a contract under Art. 114 or as a decree, under Art. 95, or as an instrument not otherwise provided for under Art. 91. 2 U.B.R. (1892–1896), 475. Q
- (i) An award declared that, in accordance with an agreement between the parties they should transfer, the one to the other, different portions of the property which was the subject of dispute. A suit by one of the parties for the recovery of the property agreed to be transferred to him was held to be governed by Art. 118 and not by Art. 144. 26 A. 497. R
- (j) A suit to recover certain toddy trees of which the plaintiff was dispossessed under an award is not governed by twelve years' limitation but by three years' limitation, the cause of action accruing from the date of the award. U.B.R. (1892–96) 475. S
- (k) Where, in a suit for a share of land alleged to be ancestral estate, it was found that the defendants were in adverse possession of it for about thirty years but that an award had been made eleven years before suit giving the

5.—“*The Court shall order the award to be filed*”—(Continued).

A.—Limitation—(Continued).

plaintiff a share therein, the award did not save limitation, since it was not followed by possession. U.B.E. (1892–96), 481. T

(4) Suit to recover money due under a registered award.

(a) A suit to recover the balance of money due under the terms of an award, is not governed by six years limitation, even though the award was registered, as the suit is not one for compensation for breach of contract in writing registered, but for the specific enforcement of the award. 16 A. 3 = 18 A.W.N. 179; 5 A. 269 = 3 A.W.N. 16. But see and compare 23 A. 285 and 23 M. 593. U

(b) A suit for recovery of money, payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by Art. 116 or Art. 120 of the Limitation Act. 8 A.L.J. 1188. V

(5) Suit on award based on registered agreement to refer to arbitration.

A suit for recovery of money, payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by Art. 116 or Art. 120 of the Limitation Act. 8 A.L.J. 1188. W

(6) Suit involving setting aside of award.

As long as there is an award in existence valid until set aside, a suit for recovery of property affected by the award will be barred by limitation if brought after the period of limitation fixed for setting the award aside. U.B.R. (1892–96), 475. X

(7) Suit to enforce award.

(a) A suit to enforce an award made by arbitrators is governed by Art. 113 and not by Art. 120 of the Limitation Act. 67 P.R. 1889; 7 O.C. 369; U.B.R. (1897–1901), 293. Y

(b) A— is not a suit for specific performance of contract falling under Art. 113 an award not being a contract but a decision of a tribunal constituted by the parties. 23 A. 285; 23 M. 593. But see 16 A. 3. Z

(c) Art. 120 and not Art. 113 or 115, Limitation Act, applies to a suit based on an award, whether the same is signed by the parties or not. 102 P.R. 1915; 32 Ind. Cas. 88. A

(8) Suit to file amended award.

Where, in the course of proceedings to enforce an award under r. 20, the Court, finding the award to be vague remitted it to the arbitrators for reconsideration, and the Chief Court refused to file the amended award, on the ground that the award was vague and the lower Court had no power to remit it for reconsideration, the cause of action for a subsequent suit based upon the amended award, is the same as the cause of action for the application to enforce the original award, and the suit being in time from the date of the amended award, was not barred. 67 P.R. 1889. B

5.—“The Court shall order the award to be filed”—(Continued).

A.—Limitation—(Concluded).

(9) Suit to compel a party to award to act up to its terms.

(a) A—is not a suit for “compensation for breach of a contract.” 16 A. 3; 4 M.
L.J. 59. G

(b) It is equally clear that it is not a suit for specific performance of a contract.
4 M.L.J. 59. D

(c) An award is not a contract any more than a decree of a Court. 4 M.L.J. 59.E

(10) Suit to set aside award.

Where a person brings a suit for partition and is met with the defence that the suit is barred by a private award to which he was a consenting party, he must have sued to set aside the award if the award was not a mere nullity but only voidable, and to such a suit, Art. 91 of the Limitation Act will apply. 5 S.L.R. 240=15 Ind. Cas. 819. F

(11) Void award—Application to set aside.

Art. 158 of the Limitation Act does not apply where the award is on the face of it void; for the Court ought to take judicial notice of its patent invalidity, notwithstanding the fact that neither party has taken any objection thereto. 16 O.C. 94=17 Ind. Cas. 320. G

(12) Creditor has no fresh cause of action on award.

An award on an arbitration, providing that a certain specified debt due by the deceased should be paid by certain persons amongst the heirs, will not give the creditor a fresh cause of action, but at most a fresh starting point for limitation. 17 A.W.N. 144. H

B.—Stamp.

(1) Award directing partition.

(a) An award by an arbitrator directing a partition is an instrument of partition within the meaning of the Indian Stamp Act II of 1899, and is therefore liable to be stamped as such.

(b) S and his son D (defendant No. 1), who originally were members of a joint Hindu family, had the ancestral property partitioned by arbitrators and the latter effected a partition by an award in 1890. This award was signed by the parties and duly registered. The original award was lost and a copy of it obtained from the Registry Office was produced to prove the partition. Held that, as the award in the present case was really such and it was not put in the form of an award merely for the purpose of evading stamp duty, there is nothing in the definition of “instrument of partition” in the Stamp Act (I of 1879) to preclude the Court from receiving it as evidence simply because it bore a stamp of Rs. 5 instead of an *ad valorem* stamp. 29 P.R. 1915=27 Ind. Cas. 489=29 P.L.R. 1916. I

(2) Other awards.

An award, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit (a) where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000 is liable to the same duty as a bond for such amount; (b) in any other case, the stamp duty is five rupees. See Art. 12 of the Stamp Act. J

5.—“*The Court shall order the award to be filed*”—(Concluded).

B.—Stamp—(Concluded).

(3) Unstamped award—Admissibility on payment of penalty.

Where an award is made by certain arbitrators upon a reference made by the parties without the intervention of the Court, but the award is not stamped, this defect can be removed by levying a penalty under the provisions of the Stamp Act, and the award can then be admitted in evidence for purposes of the proceedings under the 2nd Schedule of the Civ. Pro. Code. 66 P.R. 1913=181 P.W.R. 1913=290 P.L.R. 1913=20 Ind. Cas. 491. K

C.—Registration of awards.

(a) An award is exempt from registration, under cl. (i) of S. 17 of the Registration Act and is not rendered compulsorily registrable, by reason of the fact that it is chargeable with stamp duty as an instrument of partition, under Art. 45 of the Second Schedule of the Stamp Act, 1899. 160 P.L.R. 1906; 9 B. 50. L

(b) Where the award stated that, out of the entire land of the parties, certain shares were allotted to them by the arbitrators, and the rent due by the tenants was divided in certain other shares, and the award was signed by the arbitrators and also by the parties, to signify their consent to the arbitration and its result, *held*, that the award was not compulsorily registrable. (*Ibid.*) M

(c) For the purpose of rule 20, an award of arbitrators privately appointed does not require registration, even if it effects a partition of joint immoveable property worth more than Rs. 100 and is signed by the parties to signify their acceptance of the award, which can be filed and be made a rule of Court. 54 P.R. 1907. N

(d) Where there is really an award of arbitrators, the mere fact that the parties signed the deed does not affect its character as an award, and it is exempt from registration under S. 17, cl. i, Registration Act, 1877 (a). 81 P.R. 1913=321 P.L.R. 1913=20 Ind. Cas. 868=211 P.W.R. 1913. O

6.—“*Shall proceed to pronounce judgment according to the award.*”

Court not to pass judgment before expiry of time fixed.

A Court should not pass judgment on a private award before the expiry of the time fixed for filing objections. 2 N.W.P. 235. P

7.—“*A decree shall follow.*”

(1) Award to be given effect to without minute inquiry by Court.

The policy of the law is to enable parties who by private arrangement settle a dispute to have that settlement made legally effective: Provided that there is something to arbitrate on, that there is a reference and an award, the policy of the law is that that award should be given effect to without minute inquiry by the Court. 15 Bom. L.R. 362. Q

(1-a) Decree in accordance with award.

Where a valid award is made without the intervention of Court, a decree should be passed in accordance with the award. 4 O.O. 17; 5 O.C. 27; 14 A.W.N. 88. R

7.—“A decree shall follow”—(Concluded).

(2) Objection to form of suit no bar to passing of decree.

An objection to the form of a suit should not stand in the way of a decree being passed in terms of an award. 5 N.W.P. 226. §

(2-a) Performance of the award between the date of the award and the date of decree thereon.

The award cannot be attacked on the ground that the obligations imposed under the award have been performed between the date of the award and the date of the application to file the award. But it might be a valid defence to an application for execution of the decree passed on the award. (1916) M.W.N. 208=19 M.L.T. 228. T

(3) Award executable only after decree.

A private award becomes capable of execution, only after the passing of a decree in accordance with it. 112 P.R. 1879. U

(4) Arbitrator not bound to keep or produce any record of proceedings before him.

There is no provision of law which requires persons, to whom matters have been referred for decision by private arbitration, to adopt any special procedure, or which compels them to keep any record or to produce any record of the proceedings taken before them. 7 Ind. Cas. 333. V

(5) Rules of evidence not applicable.

The proceedings contemplated by rule 20 are proceedings of a private nature to which the rules of evidence cannot be strictly applied. 7 Ind. Cas. 333. W

8.—“No appeal shall lie from such decree.”

A.—Appeal from decrees.

1) Decree passed in accordance with private award.

(a) A decree passed in accordance with an award filed in Court under rule 20, in a case referred to arbitration without the intervention of Court, is neither open to appeal nor to revision on the points on which no appeal lies. 14 P.L.R. 1911; 1912 M.W.N. 1076; 18 C.L.J. 35. X

(b) An appeal does not lie from a decree passed in accordance with a private award, embodying the result of a settlement come to by the parties, 29 A. 224; or made a rule of Court. A.W.N. (1908), 54=5 A.L.J. 160=30 A. 151; or made after investigation of objections to the filing of the award, 10 C.W.N. 601; 10 C.W.N. 609=3 C.L.J. 450=33 C. 756; 11 C.W.N. 220. Y

(c) A decree based upon an award is not open to appeal on the ground that there was no award valid in law. 17 Ind. Cas. 7.

(d) The fact that a decree is drawn up on the basis of the judgment which follows the order filing an award in an arbitration without the intervention of the Court cannot take away the right of appeal of the party aggrieved by the order. If the appeal is allowed, the decree will become infructuous; the whole foundation of the decree will disappear and it is competent to the Appellate Court to declare that the decree is vacated. 21 C.L.J. 273=19 C.W.N. 948=28 Ind. Cas. 557. A

(2) Decree upon award—Appeal, when lies.

An appeal lies against a decree made upon an award (i) when the decree is in excess of the award, (ii) when it is not in accordance with the award, or (iii) when there is no valid award. 16 C. 482. B

8.—“*No appeal shall lie from such decree*”—(Continued).

A.—Appeal from decrees—(Concluded).

(3) Decree not drawn up specifically in terms of award—Appeal.

Where a decree on an award, instead of being drawn up specifically in terms of the award, merely decrees in general terms the claim of one party or the other, an appeal lies against the decree. 18 A. 366=11 A.W.N. 129. G

(3-a) Award defective—Joint application for reference by Court to new arbitrators—Appeal against award.

In proceedings under cl. 20 of the second schedule of the Code of Civil Procedure, it was found that the document purporting to be an award was defective. Upon this the parties, having agreed to abandon the reference to the original arbitrators, made a joint application to the Court appointing certain other arbitrators and praying that the Court would direct these new arbitrators to file an award, and would appoint an umpire in the event of the arbitrators being unable to agree. The Court then referred the matter to the new arbitrators, who delivered their award within time. The Court, after hearing and disposing of the objections to this award, passed a decree in accordance with the award: *Held*, (1) that the award was made on an order of reference by the Court on an agreement by the parties to refer to arbitration; (2) that cl. 17 to 19 of the second schedule to the Code applied; and that no appeal lay from the decree. 14 P.L.R. 1914=20 P.W.R. 1914=21 Ind. Cas. 925=28 P.R. 1914. D

(4) Right of appeal to Privy Council—Effect of certificate.

The provisions of paragraph 21, cl. (2), Sch. II, Civ. Pro. Code, cannot affect the right of appeal to the Privy Council where otherwise the case is one in which, in accordance with Ss. 109 to 111 of the Code, a certificate should be granted. Unless a case can be brought within the scope of S. 111 of the Code, it is impossible to contend that a certificate should be refused on the ground that no appeal lies to His Majesty. 15 O.C. 55=15 Ind. Cas. 2. E

B.—Appeal from orders.

(1) Appeal from order on petition to file award.

(a) An order granting or refusing an application to file a private award is appealable. 25 C. 757=2 C.W.N. 529; 27 M. 255; 100 P.R. 1907; 33 C. 757=3 C.L.J. 450=10 C.W.N. 609; 29 M. 303; 2 C.L.J. 80; 6 M.L.T. 187=2 Ind. Cas. 92=19 M.L.J. 394; 12 O.C. 40; L.B.R. 11, 105; 7 Ind. Cas. 333; 4 L.B.R. 180, *contra*; 9 O.C. 205; 3 A. 427; 5 A. 383=3 A.W.N. 56; U.B. R. (1905), C.P. 40; 3 Agra 853; 1 A. 156; 2 C.L.J. 142; A.W.N. (1907) 118; 26 A. 205; 28 A. 21=A.W.N. (1905) 160=2 A.L.J. 450; 16 C. 482. F

(b) It is competent for an appellant to contest an order setting aside an award in his general appeal against the decree. U.B.R. (1897-1901), Vol. II, p. 310. G

(c) The petitioner to the rule claimed Rs. 6,000 odd as the balance due to him on various transactions from the opposite party. The latter, on the other hand, claimed that there was a balance of Rs. 5,000 odd due to him on the transaction. The dispute was referred to an arbitrator without the intervention of the Court, and the arbitrator eventually awarded Rs. 2,005 as due to the opposite party from the petitioner:

Held, that, by reason of the application to have the award in his favour filed in Court, the opposite party was to be regarded as a plaintiff suing for the

8.—“No appeal shall lie from such decree”—(Continued).

B.—Appeal from orders—(Concluded).

amount of the award, that is, for Rs. 2,005 and an appeal against an order allowing the application of the opposite party by the Subordinate Judge lay to the District Judge and not to the High Court. 19 C.L.J. 260=18 C.W.N. 867=22 Ind. Cas. 793. H

(d) An application under para. 21 of the second schedule to the Code of Civil Procedure, asking a Court to file an award in a matter submitted to arbitration without the intervention of the Court, is a “case open to appeal” within the meaning of O. XLIII, r. 1 (d) of the same Code. An appeal will therefore lie against an order rejecting an application to set aside a decree passed *ex parte* in such a matter. The question whether a particular decree “is open to appeal” is quite independent of the question whether an appeal could be successfully maintained, 14 A.L.J. 832. I

(2) Appeal from order refusing to file award.

Where an award is illegal *ab initio*, an appeal lies from an order granting or refusing an application for filing the award. 84 P.R. 1901. J

(3) Order refusing to set aside award—Letters Patent appeal.

An _____, is a “judgment” under cl. (15) of the Letters Patent, and an appeal from that order lies under cl. 15 of the Letters Patent. 3 C.W.N. 347=26 C. 861. K

(4) Order of Assistant Collector directing award to be filed—Appeal.

No appeal lies to the District Judge from an order of an Assistant Collector, first class, directing that an award made on a matter referred to arbitration without the intervention of the Court should be filed. 8 A.L.J. 1090. L

(5) Appeal from order of reference.

An order of reference upon an agreement to refer is not appealable. 15 A.W.N. 121. M

C.—Revision.

(1) Decree passed upon award.

(a) The Court has power, in cases of error in procedure or misuse of jurisdiction, to interfere in revision with a decree passed upon an award. 9 P.R. 1918 = 16 Ind. Cas. 996; 10 C.W.N. 609=3 C.L.J. 450=33 C. 756, *contra*, see 1912 M.W.N. 1076. N

(b) Neither appeal nor revision lies in a case where the decree is not in excess of the award. 1912 M.W.N. 1076. O

(c) A decree based on a private award filed in Court is not open to revision under S. 70 of Act XVIII of 1884 as amended by Act IV of 1912, particularly when there is no *prima facie* material irregularity or illegality in the award. 13 P.W.R. 1914=114 P.L.R. 1914=23 Ind. Cas. 950. P

(2) Reference out of Court pending litigation—Filing of award—Appeal.

While an appeal from a decree of the first Court was pending in the High Court, the question in dispute was referred to arbitration independently and without the intervention of any Court. The award which clearly sets forth this circumstance was made, and the successful party applied for and obtained from the Munsif an order that it should be filed and made the basis of a decree. On appeal the District Judge set aside the Munsif's order holding that there could be no independent reference to arbitration

8.—“*No appeal shall lie from such decree*”—(Continued).

C.—Revision—(Continued).

regarding a matter which was at the time actually the subject of a pending litigation and that, therefore, there was no valid award that could be filed and converted into a decree:

Held, that the appeal to the District Judge was competent though limited to the questions of the regularity of the arbitration and the validity of the award; that there was no further appeal to the High Court; and that, as the District Judge had jurisdiction to decide rightly or wrongly that a dispute cannot be lawfully referred to arbitration and made the subject of an award while it is the subject of pending litigation and as this objection was apparent on the face of the award, the High Court could not interfere in revision. 22 Ind. Cas. 690. Q

(3) Claim against Military Officer—Decree in terms of award—Interference by High Court.

On the 9th July 1913, the plaintiff, a money lender, obtained from the defendant, a Military Officer, a promissory note for Rs. 4,931. On the 11th idem, both the parties signed a reference to arbitration whereby they agreed to refer the matter of money dealing between them to a pleader named, and nominated him arbitrator to settle the accounts and pass a judgment against the officer in favour of the plaintiff on the strength of the promissory note. At the same time, the defendant signed a *vakilpatra* authorising another pleader to appear in Court and admit the award that may be passed against him. The arbitrator made his award on the 16th July directing that the defendant should pay the plaintiff Rs. 4,931 in cash by instalments and Rs. 30 for the pleader's fees. The plaintiff filed a suit on the same day for obtaining a decree in terms of the award. The Court passed a decree accordingly. The proceedings having come to the notice of the High Court :

Held, setting aside the decree under Ss. 115 and 151 of Civ. Pro. Code, that the lower Court disregarded High Court Civil Circulars, Chap. VI, r. 1. 16 Bom. L.R. 517=88 B. 688. R

(4) Award cases held revisable.

- (a) An order refusing to file an award is not appealable and revision lies. 3 M. 68 ; 8 Bom. L.R. 570. S
- (b) Revision lies against a decree passed upon award, where the Court committed an error in procedure or misused the jurisdiction prescribed by the Code. 89 P.R. 1902 (F.B.). T
- (c) Where an award was objected to on the ground of the umpire's misconduct, and the lower Court made the decree before the expiry of the time allowed for making objections, the decree may be set aside in revision. 2 A.W.N. 76. U
- (d) It is a good ground for revision of a decree based upon an award filed in Court that no notice of filing was given by the Court to the parties as required by S. 518, G.P.C., 1892, though the applicant in revision might have received notices *aliunde*. 20 A. 474=18 A.W.N. 132 (11 M. 144, F.), V
- (e) Order setting aside the decree based on award is revisable. 29 C. 252=6 C. W.N. 614. V-1

8.—“No appeal shall lie from such decree”—(Concluded).

C.—Revision—(Concluded).

- (f) Order by District Court requiring petitioner to produce in Court an award drawn up by him as arbitrator for certain parties, but not delivered to them owing to non-payment of his fees—*Held*, the order was revisable. 22 P.R. 1897. W
- (g) As the arbitrators have no implied power to deal with the question of costs, an order filing their award is revisable in respect of the question of costs, 9 B. 82. X
- (h) Though revision lies against a decree passed upon an arbitration award on the ground of material irregularity, yet such irregularity must have reference to the lower Court's proceedings and not to those of the arbitrators. 92 P.R. 1908. Y
- (i) Where a District Munsif declined to hear certain objections to an award filed by the petitioner on the ground that they had been filed out of time, while as a matter of fact they had been filed in time, *held* that the decision amounted to a declination of a jurisdiction by the lower Court and that the same can be revised under S. 115, Civ. Pro. Code. 2 L.W. 1115. Z
- (j) Award cases held not revisable.
- (a) When once a decree has been passed in terms of an award, no revision lies. 68 P.L.R. 1905 = 41 P.R. 1905 (92 P.R. 1903, F.; 89 P.R. 1902, *not* F.) A
- (b) The Court's omission to remit an award which determines matters not referred to arbitration is not subject to revision. 92 P.R. 1903. B
- (c) Order setting aside award on the ground of the arbitrator's misconduct, being an interlocutory order, is not subject to revision. 4 Bom. L.R. 267 = 26 B. 551. See, also, 30 C. 397 = 7 C.W.N. 545; 5 A. 293. C
- (d) Where an application made to set aside an award on the ground of misconduct of the arbitrator was refused after judicial determination, and a decree was passed in accordance with the award, no revision lies. 88 P.R. 1902 (F.B.). D
- (e) No revision lies on an order setting aside award and remitting the case to the arbitrators on the ground of defects in the reference. 6 A.W.N. 123; see, also, 6 M. 414. E

D.—Miscellaneous.

(1) Representation of minor party.

In proceedings under this section, a minor party should be perfectly represented. 9 Bom. L.R. 289. F

(2) Party not to impeach award after accepting benefits therefrom.

Where a party acts upon and accepts benefits from an award, he cannot impeach it. 24 A. 164 = 21 A.W.N. 208. G

(3) Claim under award—Attachment.

A claim which may accrue under a pending award cannot be sold in execution. 7 B.L.R. 186; 14 M.I.A. 40; 8 B.H.C. (A.C.J.) 150 (151).

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877 (I of 1877), shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply¹.

(NOTES).

Old Act.

This is a new provision.

I

I.—“To which....schedule apply.”

Reference to arbitration.

A reference to arbitration made during the pendency of a suit is not governed by S. 21 of the Specific Relief Act. 50 P.R. 1891. J

23. The forms set forth in the Appendix, with such variations, as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that “the matter in difference between them shall be referred to arbitration.”
4. The applicants therefore apply for an order of reference.

A.B.

C.D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators, it should be so stated.

No. 2.

ORDER OF REFERENCE.

(Title of suit.)

UPON reading the application presented on the day of
19 it is ordered that the following matter in difference arising in
this suit, namely :—

.....

.....

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the day of
and in case of the said arbitrators not agreeing in an award the said umpire is to make

his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this day of
19

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of suit.)

WHEREAS by an order, dated the day of 19 (state
order of reference and death, refusal, etc., of arbitrator), it is by consent ordered that
Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator
with Y, the surviving arbitrator, under the said order; and it is ordered that the
award of the said arbitrators be made on or before the day of 19

GIVEN under my hand and the seal of the Court, this day of
19

Judge.

No. 4.

SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between A.B. of and C.D. of
, the following special case is stated for the opinion of the Court:—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are:—

First, whether.....

.....

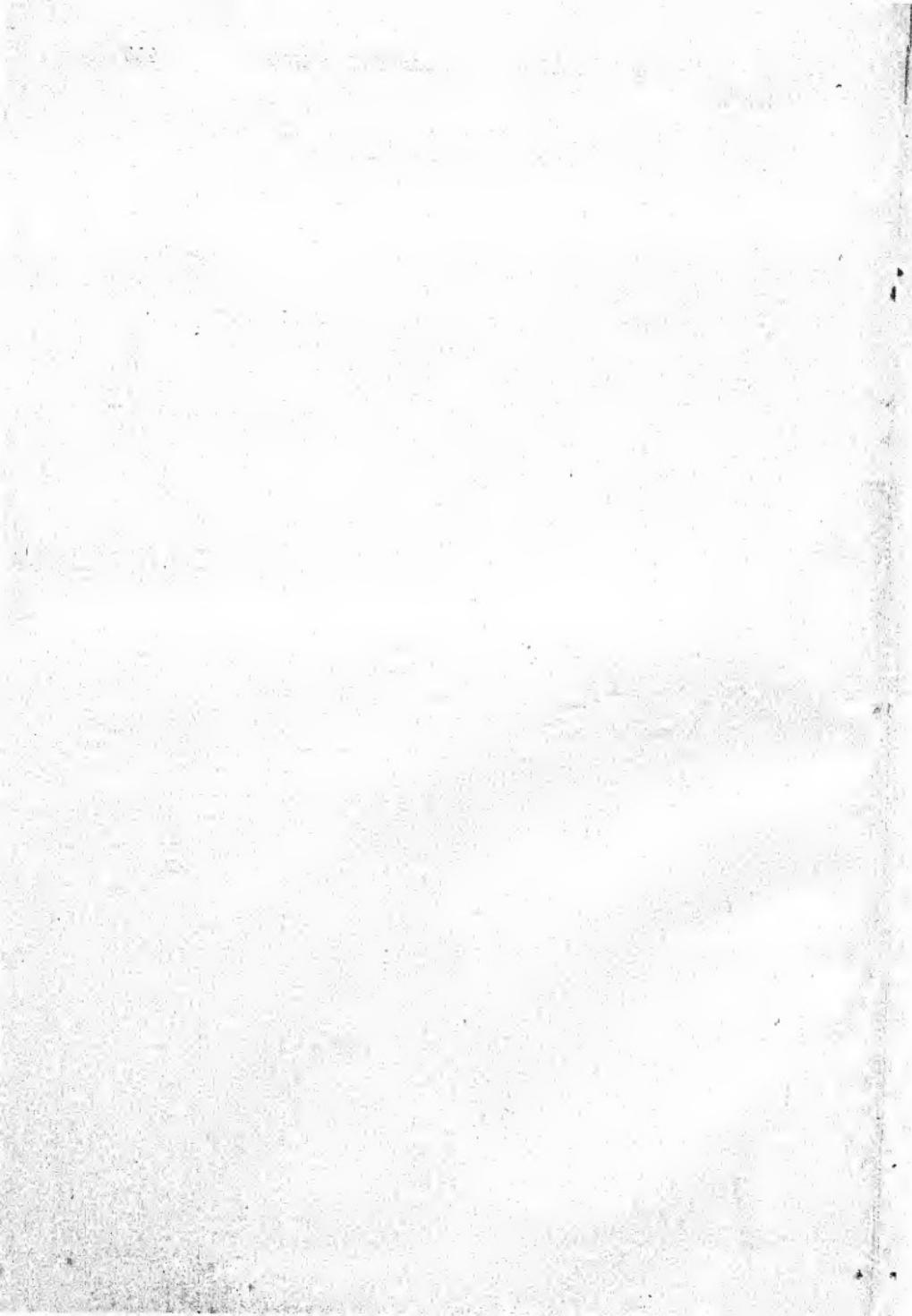
Secondly, whether.....

.....

X.

Y.

Dated the day of 19



PART III.

EXTRACTS FROM SPECIAL ENACTMENTS DEALING WITH ARBITRATION.

CONTENTS.

I.—In matters relating to land revenue.

- | | | |
|--|-----|--|
| (i) BENGAL | ... | BEN. REG. VII OF 1822, SS. 33, 34.
BEN. REG. IX OF 1833, SS. 5 TO 10. |
| (ii) PUNJAB | ... | ACT XVII OF 1887, SS. 127 TO 135. |
| (iii) ASSAM | ... | REG. I OF 1886, S. 143. |
| (iv) UNITED PROVINCES
OF AGRA AND OUDH. | ... | U.P. ACT III OF 1901, SS. 203 TO 207. |

II.—In boundary disputes.

- | | | |
|-------------------------------------|-----|---|
| (i) BENGAL | ... | BEN. ACT I OF 1887, SS. 12 TO 17.
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| (ii) BOMBAY PRESIDENCY
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III.—In partition cases ...

IV.—Under the Indian Companies Act ...

ACT VII OF 1913, SS. 152, 153, 214, 215.

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VI.—Under the Bombay Municipal Act ...

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VII.—Under the Bank Embankment Act.

ACT XXXII OF 1855, S. 7.

VIII.—Under the Religious Endowment Act ...

ACT XX OF 1863, SS. 16, 17.

IX.—Under the Indian Contract Act ...

ACT IX OF 1872, S. 28.

X.—Under the Specific Relief Act ...

ACT I OF 1877, S. 21.

EXTRACTS FROM
BENGAL REGULATION VII OF 1822.
(THE BENGAL LAND-REVENUE SETTLEMENT
REGULATION, 1822.)

33. *First.*—It shall be competent to Collectors or other officers exercising the powers of Collectors to refer to arbitration any disputes cognizable by them under the provisions of this Regulation, as well as any questions or disputes of any kind respecting land or the tenures therein, or the rights dependent thereon, that may come before them, provided the parties consent to that mode of adjustment, and, on award being made¹, to cause the same to be executed.

In referring cases to arbitration under the above provision, and in their general proceedings relative to such suits, the Collector shall be competent to vest in the arbitrators the same powers and authority in regard to the summoning and examination of witnesses, and the administration of oaths and to enforce the orders passed by the arbitrators under such powers, in the same manner as the Courts of Judicature are empowered to do; and all awards made on such references

Force of awards passed on such references shall, when confirmed by the Collector, have the same force and validity as a regular decree of the Adalat, and shall not be liable to be reversed or altered², unless the award shall be open to impeachment on the ground of corruption or gross partiality or shall extend beyond the authority given by the submission of the parties; and such ground of impeachment shall be established in a regular suit in the Zila, or other superior Court wherein the case may be cognizable.

Second.—In referring any dispute to arbitration the Collector shall be careful to specify in his proceedings, and in the deed of arbitration to be executed by the parties, the precise matter submitted to the arbitrators; and, if the award first made by the arbitrators shall not include all the points submitted to them, or shall be otherwise incomplete, it shall be competent to the Collector again to refer the matter to them, with directions to perfect their award.

Kanungos and tahsildars may be employed as arbitrators.

Third.—The paragana kanungos and tahsildars may be appointed arbitrators in any case referred to arbitration under the above rules; anything in the existing Regulations notwithstanding.

(NOTES).

1.—“ON AWARD BEING MADE.”

Decision on fact not disputed.

The finding of a Survey Deputy Collector that a party has been in possession of certain land for more than a year, where the fact is not disputed, is not a summary award under this Regulation. 11 W.R. 389. K

2.—“SHALL NOT BE LIABLE TO BE REVERSED OR ALTERED.”

Power of Court to set aside award.

An award of arbitrators under this section cannot be set aside by the Courts of Judicature. 1
Agra 267. L

34. First.—When a Collector or other officer exercising any of the powers vested in Collectors by the rules of this Regulation, relative to complaints of dispossession or disturbance of the possession of lands or premises, shall learn, either by a reference from the Magistrate, or by a report from any other public officer or otherwise, that any disputes exist within the tract placed under his jurisdiction, relative to any lands, premises, crops, orchards, pasture grounds, fisheries, wells, watercourse, tanks, reservoir or the like, likely to terminate in a breach of the peace, it shall and may be lawful for the Collector or other officer aforesaid to require the contending parties to attend in person or by representative at a stated time and place, and, after investigating the case in the presence of the parties or their representatives, or such of them as may attend, or referring it to arbitration as above prescribed, to decide the case in the same manner as if it had been brought before him by the complaint of one of the parties :

Provided also that, if the fact of previous lawful possession cannot be ascertained, it shall be competent to the Collector, subject to the orders and direction of the Board, to decide on the question of right, and to give possession to one of the contending parties, leaving the other party to contest the decision by a regular suit in Court; but no such decision shall be passed by any Collector until he shall have instituted a careful inquiry into the fact of possession, and the Board shall be careful to see that this restriction is observed.

Provided further that in such cases it shall be competent to the Collector to attach the disputed lands, premises, etc., as aforesaid, and to appoint an officer to the management of the same, retaining in deposit the rents and produce or such portion thereof as may remain after discharging any public revenue demandable therefrom, with the charges of management, until one of the contending parties shall be placed in possession.

Second.—Whenever any Magistrates or Joint Magistrates shall have before them any suit, complaint or information relative to any dispute between parties by Magistrates presents to Collector. Reference of disputes by Magistrates to Collector. regarding lands, premises, crops, watercourses or the like which may appear likely to terminate in a breach of the peace, or which it may otherwise be desirable to bring to an immediate decision, it shall be the duty of such Magistrate or Joint Magistrate, in cases in which the Collector shall be vested with the cognizance of such actions, to certify the case to that officer, and the Collector will then forthwith proceed to investigate and determine the case under the rules above prescribed :

Provided also that, in all cases of forcible dispossession or forcible disturbance of possession, the Collector shall invariably transmit to the Magistrate or Joint Magistrate a copy of the first proceeding held by him in the case, and also a copy of the rubakari containing his final award.

Collector to encourage arbitration. *Third.*—The Collector shall in all such cases use every proper means for inducing the parties to refer their disputes to arbitration, in like manner as the Diwani Courts are directed to do.

EXTRACTS FROM
BENGAL REGULATION IX OF 1833.
(THE BENGAL LAND-REVENUE SETTLEMENT AND
DEPUTY COLLECTORS REGULATION, 1833.)

5. In addition to section 33, Regulation VII of 1822, it is hereby enacted that, whenever any judicial question may be depending before a Collector or other officer employed in making settlements under the provisions of Regulation VII of 1822, in which the interests of justice may, in the opinion of such officer, require that the case be decided by arbitration, it shall be lawful for him to fix, under the instructions with which he may be furnished by the superior Revenue authorities, a period within which the parties must produce the award.

When Collector making settlements considers arbitration necessary, he may fix period for production of award.

6. In that case, if the parties shall refuse or neglect to produce such award within the term limited, it shall be lawful for the Collector or other officer to summon a panchayat, to be composed of three or five impartial and otherwise competent persons of good repute, for the trial of the matter at issue.

When Collector may summon panchayat.

7. After duly considering the statements and evidence offered by the parties, or, in case of the default or recusance of either, the statements and evidence produced by the party in attendance, the panchayat shall declare their opinions, and judgment shall be recorded according to the sentence of the majority.

The superior Revenue-authorities will from time to time issue such rules of practice for the guidance of the officers employed on this duty, or the panchayats, as they may consider necessary.

8. No appeal shall be allowed from such decisions, which shall be immediately executed and maintained, unless the Commissioner, subject to the control of the Board of Revenue, should think proper, for any special reason, to direct that the case shall be submitted to another panchayat for decision.

Bar of appeal: submission to second panchayat.

9. Any suit brought before any Court of Justice to set aside a decision made in conformity with the above rules shall be non-suited with costs.

Non-suit of suit to set aside decision; also suits against arbitrators.

10. In like manner any suit brought before any Court of Justice against the arbitrators, collectively or individually, appointed in conformity with the rules prescribed, to recover from them the value of the property lost by the decision founded on their award, shall be non-suited with costs.

Non-suit of suit to set aside decision; also suits against arbitrators.

EXTRACTS FROM
THE PUNJAB LAND REVENUE ACT, 1887.
(ACT XVII OF 1887).

CHAPTER X.

ARBITRATION.

Power to refer to arbitration. 127. (1) Any Revenue Officer may, with the consent of the parties, refer to arbitration any dispute arising before him in any matter under this Act.

(2) A Collector or an Assistant Collector of the first grade may, without the consent of the parties, refer to arbitration any dispute before him with respect to—

- (a) any matter of which an entry is to be made in any record or register under Chapter IV;
- (b) any matter relating to the distribution of an assessment under section 56;
- (c) the limits of any estate or of any holding, field, or other portion of an estate; or
- (d) the property to be divided at a partition or the mode of making a partition.

(NOTE).

Compare Rule 1, Sch. II, Act V of 1908.

M

Order of reference and contents thereof. 128. (1) In referring a dispute to arbitration a Revenue Officer shall make an order of reference, and specify therein the precise matter submitted to arbitration, the number of arbitrators which each party to the dispute is to nominate, the period within which arbitrators are to be nominated, and the period within which the award is to be delivered.

(2) The number of arbitrators which each party may nominate must be the same and must not exceed two.

(3) If from any cause arbitrators are not nominated, or an award is not delivered within the period fixed therefor in the order of reference, the Revenue Officer may from time to time enlarge that period, or may cancel the order of reference.

(NOTE).

Compare Rule 3, Sch. II, Act V of 1908.

N

Nomination of arbitrators. 129. (1) When an order of reference has been made, the parties may each nominate the number of arbitrators specified in the order, and the Revenue Officer shall nominate one other arbitrator.

(2) The Revenue Officer may, for reasons to be recorded by him, make an order disallowing any nomination made by either party, and requiring the party to make another nomination within a time to be specified in the order.

(3) An order under the last foregoing sub-section shall be final.

(NOTE).

Compare Rule 2, Sch. II, Act V of 1908.

O

Substitution of arbitrator by parties. 130. If an arbitrator nominated by a party dies, desires to be discharged, or refuses or becomes incapable to act, the party may nominate another person in his stead.

(NOTE).

Compare Rule 5, Sch. II, Act V of 1908.

P

Nomination and substitution of arbitrators by Revenue Officers.

131. In any of the following cases, namely :—

- (a) if either of the parties fails to nominate an arbitrator under sub-section (1) of section 129, within the period fixed in the order of reference ; or
- (b) if the nomination of an arbitrator has been disallowed under sub-section (2) of section 129, and another arbitrator is not nominated within the time specified in the order under that sub-section, or, having been so nominated, his nomination is also disallowed ; or
- (c) if a party entitled to nominate an arbitrator in the place of another arbitrator under section 130 fails to nominate him within one week from the date of the communication to him of a notice requiring him to make the nomination ; or,
- (d) if an arbitrator nominated by the Revenue Officer dies, desires to be discharged, or refuses or becomes incapable to act ;

the Revenue Officer may nominate a person as arbitrator.

Process for appearance before arbitrators. 132. (1) The Revenue Officer shall, on the application of the arbitrators, issue the same processes to the parties and witnesses whom the arbitrators desire to examine as he may issue in any proceeding under this Act before himself.

(2) Any such party or witness shall be bound to appear before the arbitrators in obedience to a process issued under sub-section (1), either in person or by agent, as the arbitrators may require.

(3) The person attending in obedience to the process shall be bound to state the truth upon any matter respecting which he is examined or makes statements, and to produce such documents, and other things relating to any such matter as may be specified in the process.

(NOTE).

Compare Rule 7, Sch. II, Act V of 1908.

Q

Award of arbitrators and presentation thereof. 133. (1) The arbitrators shall make an award in writing under their hands concerning the matters referred to them for arbitration, and state therein their reasons therefor, and any arbitrator dissenting from the award made by a majority of the arbitrators shall state the grounds of his dissent.

(2) The arbitrators shall present the award to the Revenue Officer in person unless that officer permits them to present it by agent.

(NOTE).

Compare Rule 10, Sch. II, Act V of 1908.

R

Procedure on presentation of award. 134. (1) When the award has been received, the Revenue Officer shall, if the parties are present, consider forthwith any objections which they may have to make thereto, and if they are not present, fix a date for the consideration thereof.

III.] EXTRACTS—ACT XVII OF 1887 (PUN. LAND REVENUE). 217
SS. 134 & 135.]

(2) Where a date has been fixed for the consideration of an award, the Revenue Officer shall on that date, or any subsequent date to which an adjournment may be made, hear any objections which the parties may have to make to the award.

(3) The Revenue Officer may also, if he thinks fit, question the arbitrators as to the grounds of their award.

135. (1) The Revenue Officer may accept, modify, or reject the award, recording Effect of award. his reasons for doing so in his decision respecting the dispute which was referred to arbitration.

(2) An appeal shall lie from the decision as if arbitrators had not been appointed.

(NOTE).

Compare Rules 12, 14 and 16, Sch. II, Act V of 1903.

3

EXTRACTS FROM
REGULATION I OF 1886.

(THE ASSAM LAND AND REVENUE REGULATION, 1886).

133. (1) The Chief Commissioner, a Commissioner of a Division, a Deputy-Commissioner, a Sub-Divisional Officer, a Settlement-officer or an Assistant Settlement-officer, a Survey-officer or an Assistant Survey-officer may, with the consent of the parties, refer any dispute before him to arbitration.

(2) In all cases referred to arbitration the procedure laid down in the Code of Civil Procedure in force for the time being shall be followed so far as applicable, and the officer referring the case shall discharge the functions of the Civil Court.

(NOTE).

Delegation of functions to Board of Revenue.

All the functions assigned by Ss. 44, 45, 60A, 70, 81, 84, 118, 122, 128 (3), 130, 141, 142, 143, 147 and 161 of this Regulation to the Local Government have been delegated to the Board of Revenue of Eastern Bengal and Assam, in respect of the districts of Darrang, Goalpara, Kamrup, Lakhimpur, Nowrang, Sibsagar, and Sylhet and the Head-quarters and the Haflakandi sub-divisions of the district of Cachar—see Notfn. No. 5-C., dated 16th October, 1905, in E.B. and A. Gazette, Extraordinary, of same date. T

EXTRACTS FROM
UNITED PROVINCES LAND REVENUE ACT, 1901.
(U. P. ACT III OF 1901).

203. The Board, a Commissioner, a Collector, an Assistant Collector of the First Class, a Record Officer or an Assistant Record Officer, a Settlement Officer or an Assistant Settlement Officer, may with the consent of the parties, by order, refer any dispute before it or him, to arbitration.

Power to refer disputes to arbitration.

(NOTE).

Compare S. 127 of the Punjab Land Revenue Act XVII of 1887.

U

Procedure in cases referred to arbitration.

203. In all cases of reference to arbitration under S. 203, the provisions of Ss. 507 to 621 of the Code of Civil Procedure shall apply so far as they are not inconsistent with anything in this Act.

(NOTE).

I.—"THE PROVISIONS.....CIVIL PROCEDURE."

Corresponding provisions in the New Code.

Rules 2 to 15 of Act V of 1903 correspond to Ss. 507 to 621 of Act XIV of 1882.

V

Application to set aside award.

205. Any application to set aside an award shall be made within ten days after the date appointed for hearing the award.

206. If the officer making the reference does not see cause to remit the award, or

any of the matters referred to arbitration for re-consideration, and if no application has been made to set aside the award, or if he has refused such application, he shall decide in accordance with the award, or if the award has been submitted to him in the form of a special case, according to his own opinion in such case.

(NOTE).

Compare (i) Rule 16 (1) Sch. II, Act V of 1903; (ii) S. 135 (1) of the Punjab Land Revenue Act. W

207. Such decision shall be at once carried out, and shall not be open to appeal unless the decision is in excess of, or not in accordance with, the award, or unless the decision is impugned on the ground that there is no valid award in law, or in fact: and no person shall institute any suit in the Civil Court for the purpose of setting it aside or against the arbitrators on account of their award.

(NOTE).

Compare (i) Rule 16 (2), Sch. II, Act V of 1903; (ii) S. 131 (2) of the Punjab Land Revenue Act. X

Recovery of fines and costs.

208. All fees, fines, costs other than costs between party and party, and other moneys ordered to be paid under this Act, shall be recoverable as if they were an arrear of revenue.

A Revenue Court shall have power, subject to any special provisions in this Act to give and apportion costs due under this Act in any proceedings before it in such manner as it thinks fit :

Provided that when land is sold under this section for moneys not payable to Government, the provisions of section 161 shall not apply to such sale.

209. When possession of immoveable property is adjudged, the officer making the order may deliver over possession in the same manner, and with the same powers in regard to all contempts, resistance, and the like, as may be lawfully exercised by the Civil Courts in execution of their own decrees.

Delivery of possession of immoveable property.

EXTRACTS FROM
THE CALCUTTA SURVEY ACT, 1887.
(BEN. ACT I OF 1887).

12. In every case of disputed boundaries the Assistant Superintendent authorized to hold the inquiry may, on the written application of the parties, Power to refer to arbitration. refer the dispute to one or more arbitrators nominated by the parties respectively, and shall fix such time, and allow such extension of time, as may seem reasonable for the delivery of the award :

Provided that, if it appears to the Assistant Superintendent that the Local Government or the Corporation of Calcutta is interested in any such dispute, he shall appoint in the former case, the Collector or Deputy Collector of Calcutta and, in the latter case, the Chairman, Vice-Chairman or Surveyor of the Corporation, one of the arbitrators, unless the parties agree to such officer being appointed sole arbitrator.

(NOTE).

Compare Rules 1, 2, 3 of Sch. II, Act V of 1908.

Y

13. Where an arbitrator nominated by a party refuses to act or becomes incapable of acting by reason of death or other sufficient cause, the party by whom he was nominated may, by a written application to the Assistant Superintendent, nominate another arbitrator; and, on being satisfied that the application has been made on sufficient grounds, he shall confirm such nomination; and the arbitrator so appointed may thereupon proceed with the inquiry.

(NOTE).

Compare Rule 5 (1) Sch. II, Act V of 1908.

Z

14. If the arbitrators differ, the award shall be in accordance with the opinion of the majority, if they are equally divided in opinion, it shall be Appointmen of competent to them or to the Assistant Superintendent, on the an umpire. written application of the arbitrators or of the parties to the arbitration, to appoint an umpire, and the decision of the umpire determining the boundaries in dispute shall have the force of an award of the arbitrators.

(NOTE).

Compare Rule 4, Sch. II, Act V of 1908.

A

15. The Assistant Superintendent shall, on the application of the arbitrators or umpire, issue the same processes to parties and witnesses as he may issue in inquiries held by himself.

(NOTE)

Compare Rule 7, Sch. II, Act V of 1908

B

16. If the arbitrators or the umpire appointed under the preceding sections fail to deliver the award within the time allowed by the Assistant Superintendent, he may make an order superseding the arbitration, and in such case he shall proceed with the inquiry.

Power to enforce attendance of witnesses in an arbitration.

On failure to make an award, Assistant Superintendent may supersede the arbitration.

(NOTE).

Compare Rule 6 (2), Sch. II, Act V of 1908.

17. The award shall be made in writing, and shall be signed by the persons making it, and shall be filed in the office of the Superintendent, with any evidence which may have been taken by the arbitrators or the umpire.

The superintendent shall lay down the boundaries in accordance with the award.

(NOTE).

Compare Rule 10, Sch. II, Act V of 1908.

D

THE BENGAL SURVEY ACT, 1875. (BEN. ACT V OF 1875).

Power to refer to arbitration.

43. Whenever the Collector thinks it necessary to decide a dispute as to any boundary under the last preceding section, he may, with the consent of the parties concerned, refer the same to arbitration.

The procedure laid down in Chapter VI of Act VIII of 1859 (the Code of Civil Sch. II of Procedure) shall, so far as may be practicable, be applicable to disputes so referred to Act V of 1908, arbitration.

EXTRACTS FROM
THE BOMBAY LAND REVENUE CODE, 1879.
(BOM. ACT V OF 1879).

120. If the several parties concerned in a boundary-dispute agree to submit the settlement thereof to an arbitration committee, and make application to that effect in writing, the officer whose duty it would otherwise be to determine the boundary shall require the said

Settlement of boundary-disputes by arbitration. parties to nominate a committee of not less than three persons, within a specified time, and, if within a period to be fixed by the said officer the committee so nominated or a majority of the members thereof arrive at a decision, such decision, when confirmed by the said officer, or, if the said officer be a Survey-officer lower in rank than a Superintendent of Survey, by the Superintendent of Survey, shall be final; Provided that the said officer, or the Superintendent of Survey, shall have power to remit the award, or any of the matters referred to arbitration, to the reconsideration of the same committee, for any of the causes set forth in Act XIV of 1882, S. 520 of the Code of Civil Procedure.

When award may be remitted for re-consideration, If the committee appointed in the manner aforesaid fail to effect a settlement of the dispute within the time specified, it shall be the duty of the officer aforesaid, unless he be cr, if the said officer is a Survey-officer lower in rank than a Superintendent of Survey, the Superintendent of Survey, see fit to extend the time, to settle the same as otherwise provided in this Act.

(NOTE).

S. 520 of Act XIV of 1882, corresponds to Rule 14, Sch. II, Act V of 1808.

E

EXTRACTS FROM
THE BURMA BOUNDARIES ACT, 1880.
(ACT V OF 1880).

Power to refer dispute to arbitration.

16. The Boundary-Officer, whenever he thinks fit, may, with the consent of the parties concerned, refer to arbitration any dispute as to a boundary.

The procedure laid down in Chap. XXXVII of the Code of Civil Procedure shall apply (so far as may be) to such references. (Now Sch. II, Act V of 1908).

EXTRACTS FROM
THE ESTATES PARTITION ACT, 1897.
(BEN. ACT V OF 1897.)

Power to allow partition to be made by proprietors themselves or by arbitrators.

51. (1) If all the recorded proprietors present, on or before the day fixed under S.50, a petition requesting to be allowed to make the partition on the basis of the papers adopted by the Deputy Collector under Chapter VI,—

- (a) privately among themselves, or
- (b) by arbitration,

the Deputy Collector may grant the request.

(2) If, after such request has been granted, the proprietors fail to make the partition within such time as may be fixed by the Deputy Collector in that behalf, the Deputy Collector shall make the partition himself.

52. When a partition has been referred to arbitration, the proceedings shall, except as hereinafter otherwise expressly provided, be conducted in accordance with the provisions of sections 506 to 522 (both inclusive) of the Code of Civil Procedure, so far as they are applicable. (Now Act V of 1908, Sch. II, Rules 1 to 15).

Procedure on reference to arbitration.

53. (1) The arbitrator or arbitrators shall, within a period to be fixed by the Deputy Collector, which period may be further extended by him, deliver to the Deputy Collector a full and complete paper of partition, in such form as the Board may, by rule, prescribe.

(2) If default is made in complying with sub-section (1), the Deputy Collector may withdraw the case from arbitration and may make the partition himself.

Remuneration of arbitrators.

54. (1) The arbitrator or arbitrators, on delivering the paper of partition as aforesaid, shall be entitled to reasonable fees for his or their services.

(2) The amount of such fees shall be fixed, with the approval of the Commissioner, by the Deputy Collector who made the reference to arbitration, and shall be deemed to form part of the costs of making the partition.

Approval of Deputy Collector and other authorities.

55. Every partition made under this Chapter by proprietors or by an arbitrator or arbitrators shall be subject to the approval of the Collector and the confirmation of the Commissioner:

Provided that no such partition shall be disallowed ¹ except—

- (a) on the ground of fraud, or
- (b) on the ground that the partition cannot be confirmed without endangering the safety of the land-revenue.

(NOTE).

1.—“NO SUCH PARTITION SHALL BE DISALLOWED.”

Power of Civil Court to set aside partition on the ground of defect in jurisdiction.

A Civil Court has no jurisdiction to set aside a partition made by the Revenue Authorities on the ground of a defect in, or erroneous exercise of, jurisdiction, without any issue of fraud or wrongful loss caused to the parties by reason of such error. 5 Ind. Cas. 451. F

56. When a partition has been made under this Chapter, the land-revenue on each separate estate into which the parent estate is divided by such partition shall be assessed by the Collector in the manner prescribed by section 10.

EXTRACTS FROM
THE INDIAN COMPANIES ACT, 1913.
(ACT VII OF 1913.)

Power for companies to refer matters to arbitration.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3)¹ The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

(NOTE).

1.—“ CLAUSE (3).”

Object of the clause.

“ It has been urged upon us that it would be a more and suitable arrangement if the provisions in the Indian Arbitration Act, 1899, were made applicable to arbitrations by compromise. It is suggested that the provisions in clauses 151 to 177 of the Bill as introduced in this respect are neither satisfactory nor as well drafted as those in the Indian Arbitration Act. The ordinary objection to referential legislation, moreover, does not apply in the present case as the provisions are part of the general law of arbitration rather than of Company law. We think there is considerable force in these contentions and have embodied the amendment in the Bill as revised by us.” Select Committee’s Report. G

153. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or

Power to compromise with creditors and members.

class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) In this section the expression “ company ” means any company liable to be wound up under this Act.

214. (1) The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement. If the parties dispute about the same, such dispute shall be settled by arbitration.

Mode of determining price.

(2) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

215. (1) Where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine Power to apply to any question arising in the winding up, or to exercise as respects Court. the enforcing of calls, or any other matters, all or any of the powers which the Court might exercise if the Company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just.

EXTRACTS FROM
THE DEKHAN AGRICULTURISTS' RELIEF
ACT, 1879.
(ACT XVII OF 1879.)

CHAPTER III.

History of transactions with agriculturist-debtors to be investigated.

12. In any suit of the description mentioned in section 3, clause (w), in which the defendant or any one of the defendants is an agriculturist, and in any suit of the descriptions mentioned in section 3, clause (y) or clause (z), the Court, if the amount of the creditor's claim is disputed, shall examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall enquire into the history and merits of the case, from the commencement of the transactions between the parties and the persons (if any) through whom they claim, out of which the suit has arisen, first with a view to ascertaining whether there is any defence to the suit on the ground of fraud, mistake, accident, undue influence or otherwise, and, secondly, with a view to taking an account between such parties in manner hereinafter provided.

When the amount of the claim is admitted and the Court for reasons to be recorded by it in writing believes that such admission is true and is made by the debtor with a full knowledge of his legal rights as against the creditor, the Court shall not be bound so to enquire, but may do so if it thinks fit.

In other cases in which the amount of the claim is admitted, the Court shall be bound to enquire as aforesaid.

Section 9, clause first of Bombay Regulation V of 1827 is repealed so far as regards any suit to which this section applies.

Nothing herein contained shall affect the right of the parties to require that any matter in difference between them be referred to arbitration¹.

(NOTES).

General.

Construction of the Act.

The Code of Civil Procedure and the Dekhan Agriculturists' Relief Act being within the territorial range of the latter, statutes *in pari materia* must be construed together so as to give effect so far as possible to the provisions of each. 8 B. 20 (24). H

1.—“RIGHT OF THE PARTIES.....TO ARBITRATION.”

Reference by parties before a Conciliator—Reference by parties to suit—Compulsory reference by Court.

When the parties go before a conciliator, and in pursuance of his advice a reference to arbitration takes place, and an award is made, effect is given to the award without scrutiny (S. 47). Where the parties are before the Court and agree to refer the dispute to arbitrators, effect must be given to their agreement (S. 12), upon which the usual results are evidently intended to follow if an award is made. It must be filed under S. 523 of the Civ. Pro. Code, 1882. This right of the parties to refer to arbitration is still preserved, though the power of compulsory reference by the Court is now taken away (Act VI of 1895, S. 3). If the Legislature has thus thought fit to preserve the full effects of an award in the case of a reference to arbitrators made after proceedings begun, there is no reason for presuming that it had a contrary intention in the case of a reference and award prior to such proceedings. The award should be filed without inquiry under this section. 21 B. 63 (68); 6 A. 400. I

15. [Reference to arbitration in certain cases.] Rep. Act VI of 1895, s. 5.

CHAPTER VI.
OF CONCILIATION.

38. The Local Government may, from time to time, appoint any person other than an officer of Police to be a Conciliator, and may cancel any such appointment.

Every Conciliator appointed under this section shall be appointed only for a term not exceeding three years, but may, on the expiration of the period for which he has been appointed, be again appointed for a further term not exceeding three years.

Every Conciliator so appointed shall exercise his functions under this Act in respect of matters affecting agriculturists residing within such local area as the Local Government may, from time to time, prescribe.

[The expression "officer of Police" in this section shall not be deemed to include a Police patel appointed under Bombay Act No. VIII of 1867 (*for the Regulation of the village-police in the Presidency of Bombay*).]

39. When any dispute arises as to, or there is a prospect of litigation regarding, any matter within the cognizance of a Civil Court between two or more parties one of whom is an agriculturist residing within any local area for which a Conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply¹ to such Conciliator² to effect an amicable settlement³ between them.

(NOTES).

1.—"ANY OF THE PARTIES MAY APPLY."

Conciliation agreement forwarded to be filed in Court—Plaintiff's death—Conciliator substituting name of heir on return of agreement by Subordinate Judge—Practice.

Under S. 39 of the Dekhan Agriculturists' Relief Act, the plaintiff applied to a conciliator praying for an amicable settlement of a dispute between himself and the defendant and came to an agreement finally disposing of the matter in dispute as contemplated by S. 13 of the Act. The agreement was forwarded to the Court of the Subordinate Judge for being filed. Notices were therupon issued by him to the parties to show cause why the agreement should not be filed and on the day of hearing he was informed that the agreement could not be filed owing to the plaintiff's death. The agreement was then returned to the conciliator, who entered therein the name of the deceased plaintiff's heir and returned it to the Court.

Held that, although there is no provision in the Dekhan Agriculturists' Relief Act empowering a conciliator to enter the name of the heir of party, and Government have not apparently under S. 40 (a) of the Act made any rules regulating the procedure before conciliators in this respect, yet, when a Subordinate Judge is seized of a conciliation agreement, there is a "proceeding" before him under the Act. He, therefore, under S. 74 of the Act, should follow the provisions of the Civ. Pro. Code, 1882, in regard to placing on the record the heirs of deceased parties. 19 B. 202. J

2.—"TO SUCH CONCILIATOR."

To which conciliator should the application for settlement be made²—Jurisdiction.

Under this section, the conciliator to whom application is to be made for an amicable settlement of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated. 13 B. 424. K

The plaintiff was an agriculturist residing in the Kopargaon Taluka. He purchased the house in dispute from the defendant on the 30th January 1872, but did not get possession. On the 12th December, 1883, the plaintiff applied to be put into possession under S. 39 of the Dekhan Agriculturists' Relief Act (XVII of 1870) to the conciliator appointed for the

2.—“TO SUCH CONCILIATOR”—(Concluded).

Khatav Taluka where the house in dispute was situate. The proceedings before the conciliator lasted until the 19th February, 1884, on which day a certificate under S. 46 of the Act was granted to the plaintiff. On the 26th February, 1884, the plaintiff brought this suit to recover possession of the house. The defendant pleaded limitation. The plaintiff contended that under S. 46 of Act XVII of 1879 the time occupied in the proceedings before the conciliator should be deducted in computing the period of limitation.

Held that the plaintiff was not entitled to such deduction, as the conciliator, before whom the proceedings had been instituted, was not one appointed for the local areas in which the plaintiff was residing, as required by S. 39 of Act XVII of 1879, and had, therefore, no jurisdiction to deal with plaintiff's application.

Held, also, that the certificate obtained by the plaintiff was not such a certificate as is required by S. 47 of the Act. 18 B. 424. L

3.—“TO EFFECT AN AMICABLE SETTLEMENT.”

Functions of a Conciliator—Appearance by agent.

A Conciliator exercises under the Act certain functions for the purpose of bringing about an amicable settlement of the dispute between two or more of the parties falling within the scope and object of the Act, and he has to exercise those functions subject to its provisions. One of them, *e.g.*, S. 41, provides that “whenever all the parties are present, the Conciliator shall call upon each in turn to explain his case.” That means that if a party to a dispute is entitled to appear before the Conciliator; and if he should appear it is the duty of the Conciliator to call upon him to explain his case. But what if a party wishes to appear before the Conciliator by an agent to explain his case and to act for him otherwise in the matter of the conciliation? Is such an agent entitled to appear and obtain a certificate for his principal or principals? The Dekhan Agriculturists' Relief Act being silent upon that point, the case falls within the rule of construction stated as follows by Stirling, J., in *Jackson and Co. v. Napper, In re Schmidt's Trade Mark*, (35 Ch. D. 162). M

“I understand the law to be that in order to make out that a right conferred by statute is to be exercised personally, and not by an agent you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *not* *authorised* to appoint an agent to act *on his behalf*. Of course the Legislature may do so; but *prima facie*, when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose.” 10 Boni. L. R. 596. N

40. If the application be made by one of the parties only, the Conciliator shall take down, or cause to be taken down, in writing a concise statement of the applicant's case, and shall thereupon, by summons or by such other means as he deems fit, invite the person against whom such application is made to attend before him at a time and place to be fixed for this purpose, and shall direct the applicant also to be present at such time and place.

Day for attendance may from time to time be postponed. If such person fails to appear at the time first fixed, the Conciliator may, if he thinks fit, from time to time extend the period for his appearance.

[A Conciliator empowered by the Local Government in this behalf may, instead of inviting, direct the person against whom the application is made to attend at the time and place either first or subsequently fixed.]

[If an applicant, or a person against whom an application is made, fails to be present or attend at the time and place specified in a direction proceeding from a Conciliator under this section, he shall be deemed to have committed an offence under XLV of 1860, section 174 of the Indian Penal Code.]

When all parties appear, Conciliator to endeavour to reconcile them.

41. Whenever all the parties are present, the Conciliator shall call upon each in turn to explain his case regarding the matter in question, and shall use his best endeavours to induce them to agree to an amicable settlement¹ or to submit such matter to arbitration.

(NOTES).

1.—“AGREE TO AN AMICABLE SETTLEMENT.”

Arrangement for payment of debt in instalments—Power to take possession in default.

(a) It would be impossible not to hold that an arrangement which provides for a plaintiff's claim to be paid the mortgage debt at once or to have the property sold, being settled by an agreement for the payment of the debt in ten annual instalments with power to plaintiff, in default of payment of any instalment, to take possession and retain possession until the debt has been satisfied out of the produce of the estate is not an “amicable settlement” of that claim. 9 B. 15 (19). O

(b) Where the sum due upon such an agreement is partly made up of interest, a provision to pay interest on any instalment remaining unpaid does not make the agreement illegal. 9 B. 15 (16). P

42. The Conciliator shall hear but shall not record the statement of any witness, and shall peruse any book of account or other document produced by the parties, or so much thereof as may be necessary, and if any party or witness consents in writing to affirm any statement upon oath in any form not repugnant to justice or decency and not purporting to affect any third person, shall provide for such oath being duly taken in the presence of all the parties.

43. If on the day on which the case is first heard by the Conciliator, or on any subsequent day to which he may adjourn the hearing, the parties come to any agreement, either finally disposing of the matter¹ or for referring it to arbitration, such agreement shall be forthwith reduced to writing, and shall be read and explained to the parties, and shall be signed or otherwise authenticated by the Conciliator and the parties respectively.

Explanation.—A Conciliator may be appointed arbitrator under this section.

(NOTE).

1.—“FINALLY DISPOSING OF THE MATTER.”

Construction.

A comparison of the Ss. 41, 43, 44 and 46 of Chapter VI leads to the conclusion that the expression “finally disposing of the matter” in Ss. 43 and 44 means no more than the expression “amicable settlement” in Ss. 41 and 46. 9 B. 15 (10). See 6 B. 77, *infra*. Q

44. (1) When the agreement is one finally disposing of the matter¹, the Conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides, and at the same time deliver to each of the parties a written notice to show cause² before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

(2) The Court which receives the agreement shall in all cases scrutinise the same, and if it thinks that the agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws, it shall, after the expiry of the said period of one month, unless cause has been shown as

aforesaid, order such agreement to be filed ; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies².

(3) If the said Court thinks that the agreement is not a legal or equitable one, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall of its own motion issue process for the attendance of the parties, and if after such inquiry as may be deemed necessary the Court finds that such agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws, it shall order such agreement to be filed ; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(4) If on the other hand, the said Court finds that the agreement does not constitute a legal or equitable agreement, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall return the said agreement to the Conciliator, and such Conciliator shall thereupon be bound to furnish on demand to the parties or any one of them a certificate under section 46.

(5) The Court may in any case, for reasons to be recorded by it in writing, from time to time extend the period of one month allowed for showing cause under this section.

(NOTES).

1.—“FINALLY DISPOSING OF THE MATTER.”

Agreement compromising amount of decree.

Under S. 44 of the Act, the plaintiff presented to the Subordinate Court of Talgao an agreement compromising the amount of a decree obtained by the plaintiff against the defendant in the Small Cause Court at Poona. The agreement stipulated that the plaintiff was to receive, in full satisfaction of the amount of the decree (which was for Rs. 59-15-1), the sum of Rs. 40 to be paid by yearly instalments of Rs. 4 each, and that, in default, the plaintiff was to recover the whole amount of the decree by executing it. The Subordinate Judge refused to file the agreement, being of opinion that it did not finally dispose of the matter. The case being referred to the High Court.

Held that the agreement was one finally disposing of the matter within the meaning of S. 44 of the Act and that, therefore, the Subordinate Judge was bound to receive it, and to proceed as directed in that section. 6 B. 77. R

2.—“SHOW CAUSE.”

Show cause, meaning.

The expression “show cause” means to allege and prove sufficient cause and not simply to object. 20 B. 208. S

3.—“IT SHALL THEN TAKE EFFECT.....LIES.”

Agreement relating to sale of mortgaged property—Necessity for order absolute for sale.

Sembie—Agreements filed under S. 44 of the Dekhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of S. 89 of the Transfer of Property Act. 1 Bom. L.R. 136. T

Procedure where agreement is for reference to arbitration.

45. When the agreement is one for referring the matter to arbitration, the Conciliator shall forward it to the Court having jurisdiction in the matter, and such Court shall cause it to be filed and proceed therein in manner provided by sections 523 and 524 of the Code of Civil Procedure,

46. If the person against whom any application is made before a Conciliator cannot after reasonable search be found, or if he refuses or Certificate to be given to applicant if conciliation fails. but the endeavour to induce the parties to agree to an amicable settlement or to submit the matter in question to arbitration fails, the Conciliator shall, on demand, give to the applicant, or when there are several applicants to each applicant, a certificate under his hand to that effect.

47. No suit¹, and no application for execution of a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a Conciliator has been appointed is a party², shall be entertained by any Civil Court unless the plaintiff produces a certificate in reference thereto obtained by him under S. 46 within the year immediately preceding.

Explanation.—The expression "Civil Court" in this section does not include a Mamlatdar's Court under Bombay Act No. III of 1876 (to consolidate and amend the law relating to the powers and procedure of Mamlatdar's Courts).

(NOTES).

I.—"NO SUIT".

(1) Power of Civil Court to file a private award.

(a) A Civil Court can file a private award to which agriculturist debtors are parties without adjusting the accounts under the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1870). 21 B. 63. U

(b) Where a matter has been referred to arbitration, without the intervention of a Court of justice, by parties one of whom is an agriculturist, and an award has been made thereon, any person interested in the award may, without obtaining the conciliator's certificate, apply for the filing of the award under S. 525 of the Code of Civil Procedure, 1882, the provisions of which are not superseded by S. 47 of the Dekkhan Agriculturists' Relief Act, 1870. 8 B. 20. V

(2) Whether an application to file a private award is a suit.

In 21 B. 63, it was held that an application under S. 525 of the Code of Civil Procedure (Act XIV of 1882) to file an award, to which agriculturist debtors are parties, is not a suit within the meaning of Ss. 3, 12, or 47 of the Dekkhan Agriculturists' Relief Act. W

It is to be remarked at the outset that the reasoning of the judgment of the Court in *Moktan v. Tukaram*, 21 B. 63 proceeds partly on the consideration that the procedure laid down in the Civil Procedure Code with reference to an application to file a private award is different from that prescribed for the hearing of an ordinary suit. But though the procedure varies, the result is the same in one respect, *viz.*, that, in either case, the Court passes a decree. And a decree, as defined in the Civil Procedure Code, is a final adjudication on the rights of the parties in a *suit*. That makes a proceeding, which ends in a decree in terms of a private award, filed in Court, a *suit*. 13 Bom. L. R. 352=35 B. 310=11 Ind. Cas. 366. X

(3) Certificate obtained by one of the co-parceners on behalf of the joint family—Effect.

The co-parceners of a joint Hindu family are entitled to maintain a suit to which the provisions of S. 47 of the Dekkhan Agriculturists' Relief Act apply, on the strength of a conciliator's certificate obtained under S. 46 of the Act by only one of those co-parceners, who was either the managing member of the family at the time the certificate was obtained, or, who, though not manager, obtained it with the consent and on behalf of the joint family acting as its agent. 10 Bom. L.R. 505. Y

2.—“ANY AGRICULTURIST.....PARTY.”

(1) Want of proper certificate.

The want of a proper certificate is not fatal to the suit. As soon as a defect in a certificate becomes apparent, the proper course is for a Court to stay proceedings, to enable the plaintiff to make good the defect by producing the requisite certificate. 13 B. 424. Z

(2) Objection as to want of proper certificate—Special appeal.

An objection to the suit, on the ground that a proper certificate had not been obtained, can be taken for the first time in second appeal, as it is an objection affecting the jurisdiction of the Courts below. 13 B. 424. A

(3) Execution application not accompanied by conciliator's certificate.

An application for execution of a decree is ‘in accordance with law’ within the meaning of Art. 183 of the Limitation Act, even though it was not accompanied by the conciliator's certificate as required by this section. 17 Bom. L.R. 206; 12 Bom. L.R. 801. But see 6 H. 31. B

43. In computing the period of limitation prescribed for

Allowance to be made in period of limitation,¹ any such suit or application the time intervening between the application made by the plaintiff under S. 39 and the grant of the certificate under section 46 shall be excluded.

(NOTES).

1.—“ ALLOWANCE TO BE MADE IN PERIOD OF LIMITATION.”

(1) Time spent in obtaining conciliator's certificate—Effect of S. 31, Limitation Act, 1908.

The plaintiff sued to recover money due on a mortgage dated the 4th March 1897. The last date on which the suit could be brought was the 4th March 1909; but S. 31 of the Limitation Act of 1908 extended this period up to the 7th August 1910. The defendant being an agriculturist, the plaintiff applied, on the 15th June 1910, to a conciliator for a certificate under S. 39 of the Dekkan Agriculturists' Relief Act 1879. The certificate was granted on the 8th August 1910; and the present suit was filed on the 10th August 1910. The plaintiff sought to bring his claim within time by urging that he was entitled, under S. 48 of the Dekkan Agriculturists' Relief Act, to exclude the whole of the time taken by him in obtaining the conciliator's certificate:—

Held, that the suit was barred by limitation, for S. 31 of the Limitation Act of 1908 gave a period of grace, which was not extensible by excluding any period of time within it. 13 Bom. L.R. 284=10 Ind. Cas. 910. C

(2) Exclusion of time in obtaining the certificate—Mode of computation.

The plaintiff's suit for possession of certain land under the Manlatdars' Courts Act (Bom. Act II of 1906) was dismissed on the 28th September 1906. He applied to a conciliator for a certificate under Chap. VI of the Dekkan Agriculturists' Relief Act, on the 24th September 1909, and obtained it on the 24th August 1910. He filed the present suit to recover possession of the land on the 29th August 1910. A question arose whether the suit was filed in time:—

Held, that reckoning the period to be excluded under S. 48 of the Dekkan Agriculturists' Relief Act by days, the suit was filed out of time by three days. 16 Bom. L.R. 661. D

(3) Time taken up in obtaining conciliator's certificate—Conciliation system abolished after grant of certificate and before date of suit.

The money advanced on two bonds became repayable on the 24th February 1910. The plaintiff applied on the 13th February 1913 to obtain a conciliator's certificate, which he obtained on the 26th April 1913. The Court was closed for the summer vacation from the 28th April to the 8th June 1913. In the meanwhile Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed the suit to recover the money on the 9th June and claimed to exclude the time occupied in obtaining the conciliator's certificate.

Held, that the plaintiff was entitled to deduct the period between his application and the grant of the certificate, because the suit, though filed on the 9th June when the conciliation system was abolished, was substantially one to which the provisions of Chapter VI of the Dekkan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation. 16 Bom. L.R. 444. E

1.—“ ALLOWANCE TO BE MADE IN PERIOD OF LIMITATION”—(Concluded).

(4) Conciliation system abolished before grant of certificate—Time taken up in conciliation—Excuse of delay.

The money due on a bond became payable on the 31st May 1910. The plaintiff applied to the conciliator for a certificate on the 28th March 1913, but before he could get it Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed a suit to recover the money on the 30th June 1913, and claimed to exclude the time between 28th March to 30th May 1913, from the period of limitation:—

Held, that though the plaintiff was not entitled to deduct the time claimed, he was entitled to such extension of time as might be necessary to give him a reasonable opportunity to enable him to file the suit in time. Where the law creates a limitation and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. This rule is subject to the limitation that it will excuse him so far as it is necessary and not beyond. 16 Bom. L.R. 441. F

Local Government # 49. The Local Government may from time to time make to make rules.¹ rules—

(a) regulating the procedure before conciliators in matters not provided for by this Act;

(b) fixing the charges to be made by conciliators, for anything done by them under this Chapter; and

(c) determining what record and accounts shall be kept by conciliators, and what returns shall be framed and furnished by them.

(NOTE).

1.—“ LOCAL GOVERNMENT TO MAKE RULES.”

Rule as to service of notice.

The rule that a notice to parties to a conciliation agreement should be served through a Subordinate Judge, framed by the Local Government under S. 49 of the Dekhan Agriculturists' Relief Act, XVII of 1879, and published at page 682, Part I of the *Bombay Government Gazette*, is not *ultra vires*, and a notice so served was held to be good notice. 10 B. 183. G

EXTRACTS FROM
THE BOMBAY DISTRICT MUNICIPAL ACT, 1901.
(BOMBAY ACT III OF 1901.)

160. (1) If a dispute arises with respect to any compensation, damages, costs or

¹ Arbitration in cases of compensation, etc. expenses which are by this Act directed to be paid, the amount, and if necessary the apportionment of the same, shall be ascertained and determined by a Panchayat of five persons, of whom two shall be appointed by the Municipality, two by the party (to or from whom such compensation, damages, costs or expenses may be payable or recoverable), and one, who shall be sir-panch, shall be selected by the members already appointed as above.

(2) If either party, or both parties fail to appoint members, or if the members fail to select a sir-panch within one month from the date of either party receiving written notice from the other of claim to such compensation, damages, costs or expenses, such members as may be necessary to constitute the Panchayat shall be appointed at the instance of either party, by the District Judge.

(3) ² In the event of the Panchayat not giving a decision within one month from the date of the selection of the sir-panch, or of the appointment by the District Court of such members as may be necessary to constitute the Panchayat, the matter shall on application by either party, be determined by the District Court which shall, in cases in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court :

Provided that—

- (a) ³ no application to the Collector for a reference shall be necessary, and
- (b) ⁴ the Court shall have full power to give and apportion the costs of all proceedings in any manner it thinks fit.

(NOTES).

General.

Scope of the section.

This section provides a remedy for the determination of the amount of compensation, to which a person becomes entitled under cl. 3 of S. 92 of the Act, by reason of his land forming part of a public street and becoming vested in the Municipality in virtue of the last portion of the first clause of that section. Both the right to compensation and the remedy for the determination and apportionment of its amount are given by the Act itself; so the right must be asserted and the remedy pursued only in the manner and upon the conditions prescribed by the Act. This is on the well-known rule of law that, where a Statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed: *Per Willes J. in Wolverhampton New Waterworks Co. v. Hawksworth*, (1859) T. C.B.N.S. 336; 13 Bom. I.R. 958 (960). H

I.—“ARBITRATION IN CASES OF COMPENSATION.”

(1) **Price of estate agreed to be fixed by arbitrators.**

As a general rule where the agreement is that the price of the estate shall be fixed by arbitrators and they do not fix it, there is no contract, as the price is of the essence of the contract of sale, and the Court cannot make a contract where there is none. But the applicability or otherwise of this doctrine depends upon whether the fixing of the price is of the essence of the contract of sale. 10 Bom. I.R. 617.

Where there is a definite and a completed contract to give and take the estate upon terms to be settled thereafter, and the valuation cannot be made *modus et forma*, the Court will substitute itself for the arbitrators. (*Ibid.*)

1.—“ARBITRATION IN CASES OF COMPENSATION”—(Concluded).

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the Municipality to acquire the same; but they could not agree as to the price. That question was referred to arbitration as required by S. 160 of the Bombay District Municipal Act, 1901; but the proceedings before the arbitrators were not successful. The plaintiff then applied to the District Judge, under S. 160 (3) of the Act, requesting him to ascertain and determine the compensation payable. The District Judge made his award. The Municipality appealed from the award, contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff.

Held, (1) that there was a contract of sale at a fair valuation, where the Court not only can provide, but under a special statute is compelled to provide, the means of ascertaining the price; and of such a contract specific performance would be awardable.

- (2) that, therefore, there was a contract between the parties from which the Municipality could not resile. 10 Bom. L. R. 617. J

(2) Award as to amount of compensation—Appeal.

In terms S. 160 does not provide an appeal. Nor can it be said that it is provided by necessary implication. Cl. 1 of the section directs that the amount of compensation shall be determined in the first instance by a panchayet appointed by the parties. Cl. 2 provides that if they fail to appoint, the District Judge shall make the appointment at the instance of either party. It is not, and can hardly be, contended that where a panchayet, appointed under either of the said clauses, has determined the amount of compensation, its award can be questioned by way of appeal to a Court of law. Cl. 3 of the same section provides that if the panchayet appointed under either cl. (1) or cl. (2) fails to give a decision within the period fixed in the clause, the District Court shall determine the amount on application by either party. It will thus be seen that the Court in question comes in as a substitute for the panchayet where adjudication by the latter has failed. What applies to the latter in the matter of appeal must apply, therefore, to the former, on the principle of the legal maxim “*noscitur a soecis*.” So far the necessary implication in S. 160 is against a right of appeal. 13 Bom. L. R. 958. K

2.—“CLAUSE 3.”

Mode of determining compensation—Procedure.

Further cl. 3 of S. 160 directs that the District Court shall follow as far as may be the procedure provided by the Land Acquisition Act (I of 1894) in determining the amount of compensation. That means that only those provisions of the latter Act apply to the proceedings before the District Court, which regulates its procedure in Land Acquisition cases. The said provisions do not include, but stand apart from, the provision relating to an appeal against an award made by a District Court under the Land Acquisition Act. The right to appeal from the award is specifically given by S. 54 of that Act. That section is, therefore, excluded from the purview of S. 160 of the Bombay District Municipal Act. 13 Bom. L. R. 958 (1900). L

3.—“PROVISO (a).”

Scope of the first proviso.

There are 2 provisos in cl. 3 of this latter section. The first says that no application to the Collector for a reference to the District Court of the question as to the amount of compensation, such as is required under the Land Acquisition Act to give jurisdiction to that Court in land acquisition cases, shall be necessary where the same Court has to determine the amount of compensation under the said cl. 3. By this proviso, S. 18 of the Land Acquisition Act, which would have otherwise applied to the proceedings before the District Court under that clause as part of the procedure to be followed, is made inapplicable to those proceedings. 13 Bom. L. R. 958 (1902). M

4.—“PROVISO (b).”

Order as to costs.

The second proviso to cl. 3 of S. 160 says that the District Court “shall have full power to give and apportion the costs of all proceedings in any manner he thinks fit.” But for this proviso, S. 27 of the Land Acquisition Act, which points out how the District Court shall make an order as to costs in land acquisition cases, would apply to the proceedings before the District Court under cl. 3 of S. 160 of the Municipal Act as part of its procedure. 13 Bom. L. R. 958 (1902). N

EXTRACTS FROM
THE BENGAL EMBANKMENT ACT, 1855.
(ACT XXXII OF 1855.)

7. Clause 1.—When the Superintendent of Embankments shall enlarge or change the line of any embankment, or make a new embankment, or Compensation for cause an embankment to be removed, any person sustaining damages thereby, who, but for the passing of this Act, would be entitled to compensation, may prefer his claim for such compensation to the Collector of the district, at any time within twelve months after the execution of the work by which he is endamaged, and the Collector thereupon shall report the case for the orders of the superior revenue authorities.

If the claim be rejected, the claimant shall not be deprived, by reason of this Act, of any right which he might otherwise have had to recover such compensation by a civil action; but such action shall not lie unless the claimant shall have first preferred his claim to the Collector within the period above-mentioned, nor unless the suit be brought within a period of one year after notice to the claimant of its rejection.

If the claim for compensation be admitted by the revenue-authorities, and the amount of compensation cannot be agreed upon, the same shall be settled by arbitration, in the manner hereinafter provided, and in no other manner, unless by the consent of the claimant and of the superior revenue-authorities.

Appointment of arbitrators. *Clause 2.*—Unless the Collector and the claimant concur in the appointment of a single arbitrator, the Collector on the part of Government, and the claimant, shall each appoint an arbitrator.

The appointment shall be in writing, and neither of the said parties shall have power to revoke the same without the consent of the other.

Arbitrator how chosen when there are several claimants for compensation. *Clause 3.*—If there be several claimants for compensation in respect to the same injury, and they cannot agree in the appointment of an arbitrator on their behalf, in that case each of them may nominate one person; and the Collector shall choose by lot out of the persons so nominated by the parties or any of them a person to act as arbitrator on behalf of the claimants.

If only one person shall be so nominated, he shall be the arbitrator on behalf of the claimants.

Appointment of third arbitrator. *Clause 4.*—When more than a single arbitrator shall be appointed, the arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing a third person to act with them as arbitrator; and, in case the arbitrators shall neglect to appoint such third arbitrator for a period of seven days after having been required so to do, the Collector may appoint such third arbitrator.

If the arbitrators differ in opinion, or if one of them, having received due notice of a meeting of arbitrators, neglect to attend, any two arbitrators may make an award.

Appointment in place of arbitrator not acting.

Clause 5.—If any person on being appointed an arbitrator shall refuse to act, or after accepting the appointment shall die or become incapable of acting another person shall be appointed in his stead, in the same manner in which the first person was appointed.

Collector empowered to enforce attendance of arbitrators.

Clause 6.—After the arbitrators have accepted the appointment, the Collector shall be competent to exercise towards them such powers and authority, for securing their attendance and the due completion of their award, as the said Collector may legally exercise towards witnesses summoned before him when acting judicially for the purposes of compelling them to attend and give evidence.

In default of award within specified period, fresh arbitrators may be chosen.

Clause 7.—If no award be made within a period to be fixed for that purpose by the Collector, he may order that the matter shall be referred to another arbitrator or other arbitrators, to be chosen in the same manner and subject to the same rules as the first.

Collector to furnish information to arbitrators, and to enforce attendance and examination of witnesses, etc.

Clause 8.—The Collector shall furnish to the arbitrators, or, so far as may be in his power, procure for them, any information which his records or those of any public department may afford connected with the subject of inquiry.

He shall, on the application of the arbitrators, summon any witnesses whom the arbitrators may call for, and whom the parties may not be able to produce before them without such process, and require the persons so summoned to bring and produce before them all such books, papers, deeds, writings, maps and plans as they shall require.

He shall also cause the proper affirmation to be made and signed by any witness whom the arbitrators may desire to examine upon affirmation, or he may empower the arbitrators to cause such affirmation to be made and signed before them.

Any witness who shall refuse or omit to appear when duly summoned by the Collector, or who shall appear but shall refuse to make such affirmation, or who shall refuse to give evidence, shall be liable to the same punishment which would be incurred under the law by a witness refusing to appear or give evidence before the Collector when acting judicially.

Any person giving intentionally and deliberately a false deposition under an affirmation, in any case referred to arbitration as above, shall be held to be guilty of perjury, and shall be liable to the penalties prescribed for that offence by law.

Award of arbitrators.

Clause 9.—On the close of the inquiry the arbitrators shall deliver a full and complete award, which shall specify the amount of compensation and the party or parties entitled thereto.

The proceedings of the arbitration shall be deposited in the Collector's office; and every party interested therein shall be entitled to a copy of the award on plain paper under the seal and signature of the Collector, which copy shall be *prima facie* evidence thereof.

Clause 10.—If the right to the compensation awarded shall in any case be doubtful, or if there exist any ground which, in the judgment of the arbitrators or of the Collector, render it improper to make immediate payment thereof to any of the claimants, the amount shall be invested in Government securities, and held in deposit until one of the claimants shall obtain an order of Court for the payment thereof.

Clause 11.—No award passed under this section shall be liable to be reversed or altered, except by the decision of a Civil Court on the ground of corruption or misconduct of the arbitrators, and no suit to set aside such an award shall be entertained, unless it be instituted within three months from the date of the award.

In case the award shall be so reversed, the matter shall be referred to another arbitrator or other arbitrators, to be appointed in the same manner as the first.

Dismissal of suits against Government. All suits and proceedings instituted against Government in any case in which compensation has been awarded, except suits instituted for the reversal of awards, as aforesaid, shall be dismissed with costs.

But nothing herein contained shall affect the right of any party to recover the amount awarded from any person who may have received the same without any just title thereto.

Clause 13.—In fixing the amount of compensation to which any person may be entitled by reason of any of the acts mentioned in cl. 1 of this section, the Court or arbitrators, as the case may be, shall take into consideration whether any party to the suit or arbitration has derived or will derive benefit from the act in respect of which the compensation is claimed, and shall set off the estimated value of such benefit, if any, against the compensation which would otherwise be decreed or awarded to that party.

Exception of cases of compensation in respect to huts, trees or crops. The provisions of this section shall not be held applicable to cases in which the compensation to be made has reference only to huts, trees or crops which it may be necessary to remove or destroy in enlarging or changing the line of a public embankment.

In all such cases the officer in charge of the public embankments of the district shall report to the Collector, and the Collector shall thereupon proceed to value and make compensation for such huts, trees and crops, in the manner prescribed in S. 12 of this Act.

EXTRACTS FROM
THE RELIGIOUS ENDOWMENTS ACT, 1863.
(ACT XX OF 1863.)

16. In any suit or proceeding instituted under this Act, it shall be lawful for the Court before which such suit or proceeding is pending to order Reference to any matter in difference in such suit¹ to be referred for decision arbitrators,² to one or more arbitrators².

Whenever any such order shall be made, the provisions of Chapter VI of the Act VIII of 1859 Code of Civil Procedure shall in all respects apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under S. 312 of the said Code. [Now Civil Procedure Code (Act V of 1908)], Sch. II, r. 1.

(NOTES).

General.

Section applicable only to public endowments.

Two plaintiffs, members of a Hindu family, applied for and (in the presence of the defendants), obtained leave to institute a suit against the defendants, who were the *shebaits* of a certain idol, for the purpose of having them removed from their office, on the ground of misconduct. In their plaint they alleged that the endowment was a public one, all Hindus having a common right of worshipping the idol. This was denied by the defendants. After issues had been framed, the Court of first instance made an order, under S. 16 of the Act, referring certain of them to arbitration, although the defendants contended that as the endowment was not a public one, the Act had no application, and objected to the reference. The arbitrators made an award, finding, *inter alia*, that the idol was the ancestral family idol of the parties to the suit, and that the endowment was not made for the benefit of the public. They further in their award laid down certain definite rules according to which the *sheba* ought to be conducted and repairs to the temple made. The Court of first instance passed a decree on that award, declaring that the idol was the ancestral idol of both parties, and directing that the defendants should perform the worship in a certain manner, and should execute certain repairs to the temple within six months, and declaring that if the parties did not act as directed, any member of the family should be able to bring a suit for the appointment of a manager. Against that decree the defendants appealed, and contended that the Act did not apply to the case on the finding of fact as to the endowment not being a public one; that the compulsory reference to arbitration was illegal and void, and that the decree was not one authorized by the terms of S. 14 of the Act. On behalf of the plaintiffs it was contended that the defendants were precluded from raising these questions on appeal, as the order passed under S. 18 of the Act was made in their presence and was not appealed against, and that, having regard to the provisions of S. 20 of Act XII of 1887, an appeal to the High Court lay from that order.

Hold, that on the facts as found by the arbitrators, Act XX of 1863 did not apply to the case, and that the compulsory reference to arbitration and the decree made thereon were illegal and void. 19 C. 275 (276). O

I.—“ANY MATTER IN DIFFERENCE IN SUCH SUIT.”

(1) **Decision of whole suit cannot be referred to arbitration.**

Under S. 16 of the Religious Endowments Act XX of 1863, it is open to a District Judge to refer any matter in difference in the suit for decision by an arbitrator, but it is not open to him to refer the whole suit for decision to an arbitrator. 12 M.L.J. 401 (402)=26 M. 361. P

(2) **Question of removal of trustee.**

The District Judge has jurisdiction to refer to an arbitrator the question of the removal of a trustee arising in a suit instituted under S. 14 of the Religious Endowments Act. 12 M. L.J. 431. Q

1.—“ANY MATTER IN DIFFERENCE IN SUCH SUIT”—(Concluded).

(3) Question of dismissal of members of Devastanam Committee.

(a) A District Court may refer to arbitration, and the arbitrators may decide the question of the dismissal from office of the members of a devastanam committee. 19 M. 498. R

(b) Thus, where a suit for dismissal of the members of a devastanam committee and for damages was referred under Act XX of 1863, S. 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest, it was held that the Court had power to refer the matter to the arbitrators and award damages with interest, provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint. (*Ibid*). S(c) *Per Subramania Iyer, J.*—“The jurisdiction to remove a trustee exercised by the Civil Courts has no reference to crimes or their punishment. In the first place it is a purely civil jurisdiction exercised by the Courts and ancillary to its principal duty to see that the trusts are properly executed (*Lettierstede v. Broers*, L.R. 9 App. Cases, 380). Nor is it true that removal from office is decreed always as punishment. No doubt such relief is often granted when misconduct is proved. But, as pointed out by the Judicial Committee, a trustee may be removed even when no misconduct is established if the Court is satisfied that the continuance of the trustee would prevent the due execution of the trusts.” (*Ibid*) 500. T

2.—“REFERRED FOR DECISION TO ONE OR MORE ARBITRATORS.”

Consent of the person to be bound by the award not obtained.

Plaintiff brought a suit to obtain a decree dismissing defendants, Committee and Manager of a certain Pagoda, from their offices on the ground of unseveration. The Court made an order expressed to be by consent of the parties concerned, and in exercise of the Court's discretionary power under S. 16 of Act XX of 1863, referring the matters in difference to three arbitrators for final determination, said arbitrators “to make their award in writing and submit the same” within a certain period. Each arbitrator delivered a separate award in writing, two arbitrators finding for the plaintiff. The Civil Judge made a decree in accordance with the award of the majority of the arbitrators. The 1st defendant appealed on the grounds; (1), that he had not consented to the arbitration; and (2), that there being no provision in the order of reference to the effect that the finding of a majority of the arbitrators should prevail, there was no valid award. *Held*, that, in this case, the order of the Judge was valid without the assent of the persons to be bound. 7 M.H.C. 173. U

The Court observed as follows:—“It is unnecessary to determine in this particular case whether into such a submission by agreement, the principle should be imported that where an act is to be done by a body, the act of the majority of the units of that body is the act of the body. Here the order of the Judge was valid without the assent of the persons to be bound. There can be no doubt that he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and there is no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous command.” 7 M.H.C. 173 (175). V

17. Nothing in the last preceding section shall prevent the parties from applying to the Court, or the Court from making the order of reference under the said S. 312 of the said Code of Civil Procedure (now r. 1, Sch. II, Act V of 1908).

EXTRACTS FROM
THE INDIAN CONTRACT ACT, 1872.
(ACT IX OF 1872.)

Agreements in restraint of legal proceedings void.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights ¹ by the usual legal proceedings in the ordinary tribunals, or which limits the time ² within which he may thus enforce his rights, is void to that extent.

Exception 1.—This section shall not render illegal a contract ³, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration ⁴, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer to arbitration dispute that may arise.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

(NOTES).

(1) Scope of section.

(a) This section covers such contracts alone as, wholly or partially, prohibit the parties, absolutely, from having recourse to a Court of Law; and exception 1 only applies to contracts, wherein the parties have agreed that no action shall be brought until some question of amount has first been decided by the arbitrators; such an agreement does not exclude the jurisdiction of Court, but only stays the plaintiff's hand, till the amount is ascertained. 1 C. 486 (appeal from 1 C. 42) followed in 6 M. 368 (370). W

(b) An agreement would be void under this section, so far as it could be construed as precluding a party thereto from insisting on his legal rights in respect of the matters agreed upon. 5 Bom. L.R. 373 (884). X

(2) Effect of the section.

The effect of S. 28, Contract Act, S. 21 of the Specific Relief Act, read with the related sections of the Arbitration Act, and of the Civil Procedure Code dealing with arbitration, is, that a person may not contract himself out of his right to have recourse to Courts of law, but that, in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts. 11 Bom. L.R. 273. Y

1.—“ RESTRICTED ABSOLUTELY FROM ENFORCING HIS RIGHTS.”

(A) Agreements in restraint of legal proceedings.

(1) Stipulation prohibiting suit on agreements.

A stipulation, in an agreement, restraining the institution of a suit or other proceeding, in respect of anything done or omitted under the agreement, is ineoperative; *obiter*.—It is not advisable to introduce such restrictive clause into agreements, for, though the law deprives them of any legal validity, the ignorance of the party may give them an illegitimate operation, by inducing him to abandon a part of his just rights under the contract. 4 M.H.C.R. 120 (123). Z

(2) Agreement to forbear from suing third party.

Where a person promises to another to forbear from suing a third person, on the promisee undertaking to indemnify the promisor for any loss he might incur thereby, the agreement would be void under this section, only so far as the right of the latter to sue his debtor has been thereby restricted. 120 P.R. 1879. A

1.—“RESTRICTED ABSOLUTELY FROM ENFORCING HIS RIGHTS”—(Concluded).

(A) Agreements in restraint of legal proceedings—(Concluded).

(3) Agreement to accept arbitrator's decision as final.

A stipulation, in an agreement to submit to arbitration, that the decision of the arbitrator should be accepted as final, and that no appeal should be made therefrom by either party, is void, as restricting the parties absolutely from enforcing their legal rights; and the Court is not prohibited, notwithstanding such a stipulation, from setting aside the award on the ground of misconduct on the part of the arbitrators. 6 M. 308 (*following* 1 C. 466). But see 1 A. 207. B

(4) Stipulation restricting mode of proof.

A stipulation in a bond, executed by defendant to plaintiff, that the former shall not plead any payment towards it made otherwise than by means of an endorsement on the back of the bond, cannot be permitted to control Courts of justice, as to the evidence which, under the rules of general law of evidence, may be admitted in proof of such payments. (6 M.H.C.R. 451 and 1 N.W.P.H.C.R. 146, *Appr.*) 1 B. 45. C

(B) Agreements not in restraint of legal proceedings.

(1) Agreement not to appeal.

(a) By an—a party does not restrict himself absolutely from enforcing a right under, or in respect of, any contract. He merely foregoes his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is prohibited neither by the language nor the spirit of the Contract Act. 1 A. 207 (268); but see 6 M. 308. D

(b) An agreement made, at the time of the pendency of an appeal in the High Court, by which it was undertaken that no appeal should be made therefrom to the Privy Council, was held valid, since the rights of the parties were not thereby restricted absolutely, within the meaning of this section. 9 B.L.R. 460—14 M.I.A. 203. E

(c) An agreement, entered into by a person, who obtained a decree for possession of a portion only of the land he sued to recover, to the effect that, upon the condition that he should not prefer an appeal, he should be given a larger part of the lands than he was entitled to under the decree, is enforceable as a valid contract. 3 C.L.R. 374. F

(d) This section cannot affect the terms of a petition filed in Court by a judgment-debtor, arrested in execution, undertaking in consideration of his release, and of being allowed to pay by instalments, not to prefer any appeal from the judgment. 10 C.L.R. 443=8 C. 455. G

(e) An agreement not to appeal, entered into by a judgment-debtor, in consideration of time being given for satisfying the decree against him, is not void as purporting to oust the jurisdiction of Courts. For if a person, after mature deliberation, enters into an agreement for the purpose of compromising a *bona fide* claim, to which he believes himself to be liable, the compromise is a sufficient consideration for the agreement, and such agreement is valid and enforceable. 1 A. 267. H

(2) Bond in renewal of former bonds.

A bond, given in renewal of former bonds, constitutes a new security to take effect from its date and cannot be regarded as void, under this section, for restraining the enforcement of the prior bonds. 2 N.W.P.H.C.R. 37. I

2.—“OR WHICH LIMITS THE TIME.”

(1) Agreement altering operation of limitation.

An agreement limiting or extending the time, within which a person may enforce his rights under the law of limitation, is generally void to that extent; but, there may be an agreement, that, in consideration of an enquiry into the merits of a disputed claim, no advantage should be taken of the statute of limitations, in respect of the time employed in the enquiry, and an action might be brought for breach of such an agreement. 5 M.I.A. 43 (70). J

(2) Condition to sue within certain time.

(a) A contract for insurance contained a clause, which ran thus: “No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues.” A suit was brought on the contract after the period, but within three years as provided by Art. 86, Limitation Act, and it was urged that the condition curtailing the period of limitation was void under S. 28, Contract Act. K

2.—“OR WHICH LIMITS THE TIME”—(Concluded).

Held, that the condition was valid, for the parties agreed thereby in substance that, if no suit were brought within a year, neither party should be regarded as having any rights as against the other. 14 Bom. L.R. 741; but see 11 Ind. Cas. 756. L

(b) A condition in a life-insurance policy saying that no suit shall be brought on the policy after one year from the death of the assured is void under 28 of the Contract Act. 11 Ind. Cas. 756. M

3.—“CONTRACT.”

Uncertified adjustment of a decree.

The word “contract” does not include a decree and so, the uncertified adjustment of a decree out of Court is ineffectual only so far as the execution of the decree is concerned, and there is nothing in this section to make such an agreement void as in restraint of legal proceedings. 7 A. 124 (131). N

4.—“ARBITRATION.”

(1) Agreement to refer to arbitration, nature of.

(a) An agreement for arbitration is, in law, on the same footing as all other lawful agreements, by which the parties are bound to the terms of what they have agreed, unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. 12 M.I.A. 131. (*Overruling* 1 M.H.C. 178, 3 M.H.C. 82). O

(b) A contract, providing for a reference to arbitration, in case of disputes as to quality between buyer and seller, is not one in restraint of legal proceedings, but one intended to avoid costly litigation as to the quality of the property purchased. 7 Bom. L.R. 805. P

(c) An agreement to refer an existing dispute to arbitration is not unlawful, and such a dispute once referred thereon to arbitration, cannot be withdrawn from such arbitration. 7 M.H.C. 257 (280); 8 M.H.C.R. 46 (*Cf.* 1 M.H.C. 178, 3 M.H.C. 82, *overruled* by 12 M.I.A. 131, *supra*). Q

(2) Clause in a contract empowering reference to arbitration.

On an application to file an award in accordance with the rules made under S. 20 of the Arbitration Act, the defendants contended that the awards ought not to be filed by reason of the illegality of the arbitration clause in the contract between the parties : *held*, that such an arbitration clause comes within the definition of a submission to arbitration under S. 4, cl. (4) of the Act and that, therefore, the clause was a perfectly lawful one. Further, the arbitration clause in the contract is covered by exception 1 to S. 28 of the Contract Act. 33 C. 1169. R

(3) Arbitrator may be an interested party.

(a) The rule that no man is to be a judge in his own cause would not apply, so as to avoid the award of a referee, to whom, though necessarily interested in the result, the parties had contracted to submit their differences. 5 M. 181. S

(b) An agreement by a servant of a Company that, in case of any breach of the rules by him, the manager of the Company shall be the sole judge as to the right of the Company to retain the whole or any part of the sum deposited by the servant, was held to be a contract to refer to arbitration within the section, rendered valid by its exception 1. 11 C. 232. T

(4) Effect of arbitrator's decision—Collusion of arbitrator.

Where an agreement provided that defendants should pay the plaintiff at a certain proportion, upon the value of building work executed by the plaintiff, as certified by an architect, in the absence of proof of collusion between the architect and the plaintiff, the defendants were bound by the architect's certificate as to the amount due to the plaintiff. 10 M. 178. U

(5) Agreement not to question validity of award.

But, exceptions 1 and 3 to S. 28, Contract Act, do not legalise an agreement not to object at all to the validity of the award on the grounds mentioned in S. 521, Civ. Pro. Code 1882. 6 M. 368 (370). V

(6) Agreement to refer to arbitration—Right of suit.

A suit, in respect of the subject-matter agreed to be referred to arbitration, would not be barred, unless it be shown that the agreement subsists as an operative contract and has not been broken by the conduct of the parties. 8 A. 57. W

4.—“ARBITRATION”—(Concluded).

(7) Agreement to refer to arbitration on collateral covenant.

An arrangement between the parties to an agreement, as to referring to arbitration any covenant merely collateral to the agreement, cannot affect their right of suit under the agreement itself. 6 B. 525. X

(8) Unreasonable delay in reference to arbitration, effect of.

A party to a reference may decline to proceed with it and revoke the agreement, in case of unreasonable and unexplained delay on the part of the other party. 17 C. 200. Y

(9) Effect of order of Court superseding arbitration.

On an order of a Court superseding an arbitration, any subsequent suit by the parties to the superseded agreement would not be barred by the provisions of this section. 37 P.R. 1876. Z

EXTRACTS FROM
THE SPECIFIC RELIEF ACT, 1877.
(ACT I OF 1877.)

21.

And, save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration¹ shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it² sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(NOTES).

(1) Applicability of proviso.

The proviso to S. 21, Specific Relief Act, relates only to inchoate and abortive arbitration proceedings, and not to a case where the contract to refer to arbitration has been carried out.

A complete award is equivalent to a final judgment binding on the parties and ousts the jurisdiction of the Court in a suit relating to the matters decided by the arbitrators. 8 L.E.R. 137. A

(2) Non-applicability of section to cases governed by Arbitration Act.

The last 37 words of S. 21 of the Specific Relief Act do not apply to the agreement to refer to arbitration, in cases where, if the matter submitted to arbitration were the subject of a suit, the suit could have been instituted in a Presidency town. The provisions of the Arbitration Act IX of 1890 are applicable to such a case. 37 P.R. 1912=130 P.W.R. 1012=15 Ind. Cas. 402. B

1.—“CONTRACT TO REFER A CONTROVERSY TO ARBITRATION.”

(1) General agreement to refer future differences.

A general agreement to refer future differences to arbitration comes within S. 523 of the Civ. Pro. Code, 1882 which is not confined to cases in which a dispute actually existing at the date of agreement is agreed to be referred to arbitration. But the agreement must name the arbitrators, and an agreement which provides for the future appointment of arbitrators does not come within the said S. 523. 20 B. 232. C

(2) Partner's power to submit to arbitration.

One partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. 22 A. 135=20 A.W.N. 12.D

(3) Agreement to refer to arbitration future disputes—Maintainability of suit—Burden of proof.

The parties to the suit entered into an agreement, which contained a condition that, if any dispute arises between the parties regarding the agreement, it shall be settled by a certain person and his decision shall be binding on the parties. The plaintiffs sued the defendants for recovery of money basing their claim on the agreement. It was contended that, since the plaintiffs had refused to refer the dispute between them to the arbitration of the person named, their suit was barred by S. 21 of the Specific Relief Act.

Held, that the burden of establishing the plea was on the defendants and that they had failed to discharge it. 35 P.L.R. 1911=25 P.R. 1911=55 P.W.R. 1911=9 Ind. Cas. 736. E

(4) Agreement to refer to arbitration pending suit.

(a) The wording of this section is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court. 9 A. 168.

(b) Where after an adjournment of a suit obtained by the parties for such purpose the matters in difference between them were referred by them to arbitration and an award was made thereon disallowing the plaintiff's claim, it was held that further hearing of such suit was barred. 4 A. 546=2 A.W.N. 135.

1.—“CONTRACT TO REFER A CONTROVERSY TO ARBITRATION”—(Concluded).

(5) Effect of withdrawal of suit since reference to arbitration.

Where an order of reference to arbitration was made by Court, but before the date fixed for the delivery of award the plaintiff withdrew his suit under S. 373 of the Civ. Pro. Code 1882, with leave to bring a fresh suit, it was held that the plaintiff was competent to bring a fresh suit. 1 A.L.J. 257. H

(6) Suit to compel a party to sign a reference.

No suit lies under the Specific Relief Act, S. 21, as amended by the Arbitration Act, to compel a party to sign the reference. 4 S.L.R. 149=8 Ind. Cas. 926. I

(7) Distinction between suit on award and one for specific performance of agreement to refer to arbitration.

In a suit on an award to recover a certain sum of money allowed by the arbitrator, the defendant's contention, that, having regard to this section and S. 30 of this Act the suit was not maintainable, was disallowed on the ground that it proceeded on the assumption that the suit was one for specific performance, which in fact it was not. 28 B. 1=5 Bom. L.R. 705. J

2.—“HAS REFUSED TO PERFORM IT.”

(1) Filing a plaint not amounting to refusal.

Before this section can be relied upon in bar of a suit brought in respect of a subject-matter which the parties had agreed to refer to arbitration, it must be shown that the plaintiff had refused to make such a reference, and the mere filing of plaint does not amount to such a refusal. 5 C. 498 (at p. 500). See, also, 8 A. 57=5 A.W.N. 331. K

(2) Suit for damages for breach of contract—Agreement to refer to arbitration any dispute arising under the contract—No proof of refusal to refer.

Plaintiff sued for damages for breach of a contract. The defence was that the suit was unsustainable, on the ground that there was a stipulation in the contract in question, to refer the dispute arising thereunder to arbitration, and that the plaintiff ought not to have sued in the face of that stipulation. There was no evidence to show, either that the defendant proposed to refer to arbitration before the suit was brought or that the plaintiff refused to proceed to arbitration. Held, that S. 21 of the Specific Relief Act can be relied on as bar to a suit on a contract, only in case of a refusal by plaintiff to refer the dispute to arbitration, and that, in this case, no such refusal on the part of the plaintiff having been proved, the defence was unsustainable. 80 P.R. 1906=70 P.L.R. 1907. L

(3) Refusal to arbitrate to be before suit.

A refusal to arbitrate so as to bar a suit must be before the action is brought in order that such refusal and the arbitration clause may constitute a defence to an action on the agreement. 23 C. 556. M

(4) Revocation of authority of arbitrators.

A party to an agreement to refer a matter in dispute to arbitration has power to revoke, at any time before the award, the authority of the arbitrators appointed by him, and even in the case referred to in the first exception to S. 28 of the Contract Act a suit will not lie to enforce an agreement to refer to arbitration. But the above S. 28 does not forbid an action for damages for the breach of such an agreement. 1 C. 42; (1 C. 466 on appeal). N

(5) Revocation of agreement to refer.

Where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to rescind from the agreement unless for good and sufficient cause. 17 C.W.N. 351=17 Ind. Cas. 690. O

(6) Contract to refer to arbitration—No time fixed for award—Revocation inferred from conduct of parties.

The plaintiff and the defendant agreed to refer their disputes to arbitration. The defendant attended the meetings of the arbitrators, but the plaintiff did not, and gave a notice to the arbitrators not to proceed with the award. The arbitrators dropped further proceedings. The defendant did not attempt to put in force the provisions of the Code of Civil Procedure to force on the award, and allowed the limitation to expire. Then the plaintiff sued and the defendant resisted the claim on the strength of S. 21 of the Specific Relief Act:

2.—“ HAS REFUSED TO PERFORM IT”—(*Concluded*).

- Held* (1) that a contract to refer disputes to arbitration implies a contract to do all things necessary to the making of a valid award, so far as the parties were concerned ;
(2) that a contract to refer to arbitration could be rescinded by mutual agreement of both parties or by one of them for a just cause ;
(3) that the burden of proving the existence of just cause for revocation lay upon the party who revoked the contract.

Per Richards, J.—If, after a contract to refer is entered into, nothing is done for a long time, the Court might infer that the parties rescinded it by mutual consent. But this is not a necessary inference.

If the contract to refer was never rescinded, it must be in existence; the mere fact that there might be difficulty in applying the provisions of the Code of Civil Procedure to the case does not render the contract non-existent.

Per Tudball, J.—If one of the parties to a contract to refer refuses to go on with the arbitration, the other party might resort to one of the following courses open to him :

- (a) He might take action within the period of limitation, under the provisions of the law as contained in the Civil Procedure Code, to enforce a decision by the arbitrators, or
(b) He might sue for damages for breach of contract.

If the party entitled to the above remedies has resorted to neither of the two courses within the period of limitation, the contract can no longer be said to be in existence in the eye of the law. 6 Ind Cas. 420. P

3.—“ THE EXISTENCE OF SUCH CONTRACT SHALL BAR THE SUIT.”

(1) When Court's jurisdiction ousted.

Where parties to a suit have agreed to refer the matters in dispute between them to arbitration, such an agreement ousts the jurisdiction of the Court where it has been made before suit or during the pendency of it and whether it is filed in Court under S. 523 of the Civil Procedure Code (1852) or not. 27 A. 53=1 A.L.J. 398=A.W.N. (1904) 160. Q

(2) Existence of agreement when no bar to suit.

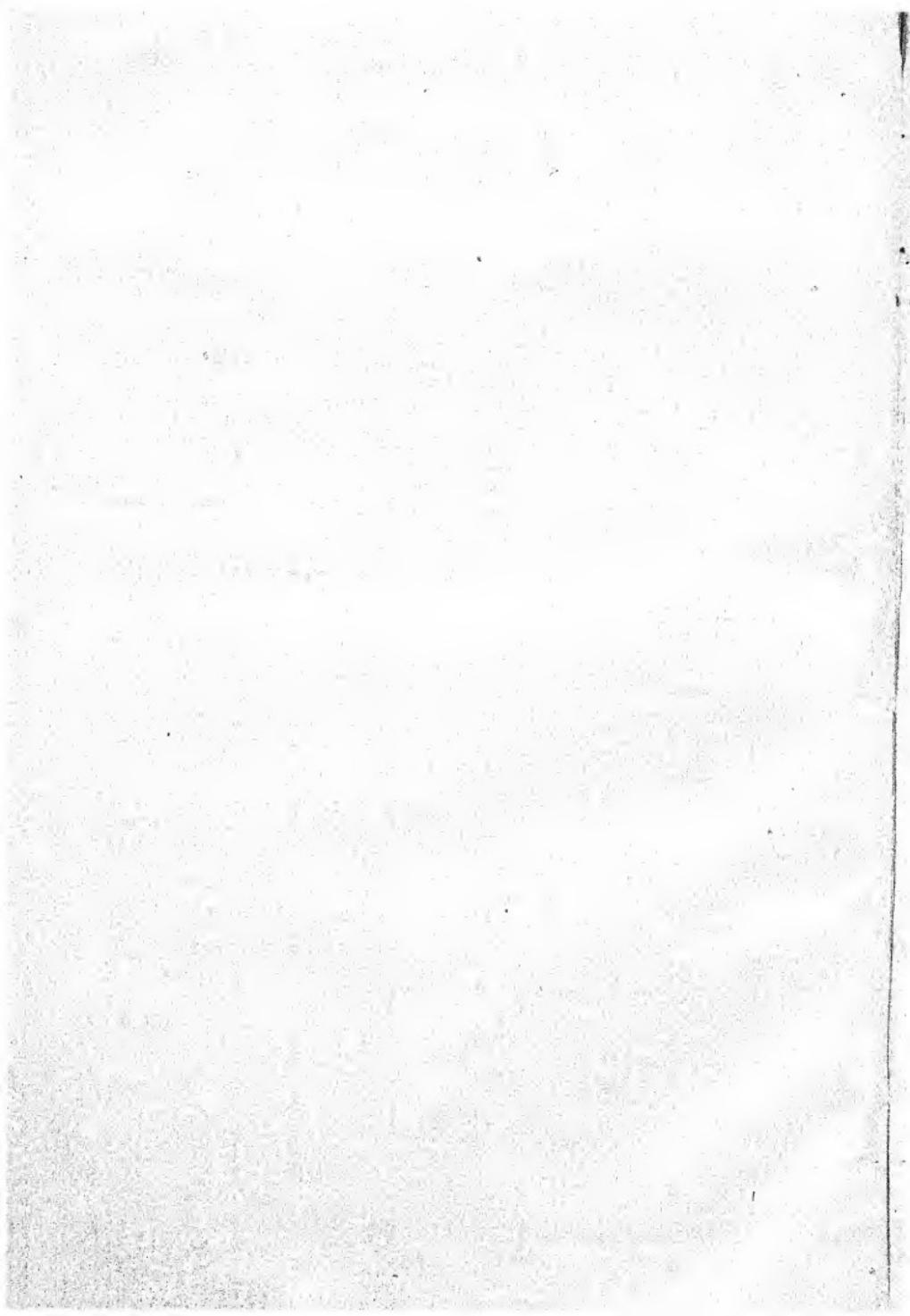
Even where the person who made such a contract had refused to perform it, if there were nothing to show that the other party had not acquiesced in it, the existence of the agreement would not bar the plaintiff's suit. 11 B. 109. R

(3) Application for stay not made—Effect on the section.

Where at the time the suit is instituted no application under S. 19 of the Arbitration Act or under S. 18 of the second schedule of the Civil Procedure Code is made for stay of suit, the suit is not barred by the last clause of S. 21 of the Specific Relief Act. 37 P.R. 1012=130 P.W.R. 1012=15 Ind. Cas. 402. S

(4) Refusal of arbitrator to act—Agreement to refer not subsisting.

Where an agreement was to refer the dispute to three named arbitrators without any provision for the appointment of other arbitrators and two of them refused to act, there is no subsisting agreement capable of being carried into effect, and S. 21 of the Specific Relief Act is no bar to a suit in respect of any subject which was referred to arbitration. 12 M.L.T. 346=(1912) M.W.N. 957=24 M.L.J. 15. T



APPENDIX.

THE ARBITRATION ACT, 1889, 52 & 53 VICT., C. 49.

An Act for amending and consolidating the Enactments relating to Arbitration.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

References by Consent out of Court.

Submission to be irrevocable, and to have effect as an order of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.

Provisions implied in submission.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Reference to official referee.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power to stay proceedings where there is a submission.

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

5. In any of the following cases :—

(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :

(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :

(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court of a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties 6. Where a submission provides that the reference shall be in certain cases to two arbitrators, one to be appointed by each party, then, supply vacancy. unless the submission expresses a contrary intention—

(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a judge may set aside any appointment made in pursuance of this section.

Powers of arbitrator. 7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(a) to administer oaths to or take the affirmations of the parties and witnesses appearing; and

(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and

(c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

8. Any party to a submission may sue out a writ of subpoena *ad testificandum*, or

Witnesses may be summoned by subpoena. a writ of subpoena *duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award. 9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.

10. (1) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any part of them, to the reconsideration of the arbitrators or umpire.

Power to remit award. (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Power to set aside award. 11. (1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

Enforcing award. 12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

13. (1) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment in order to the same effect.

Power to refer in certain cases. 14. In any cause or matter (other than a criminal proceeding by the Crown),—

- (a) If all the parties interested who are not under disability consent; or,
- (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,
- (c) If the question in dispute consists wholly or in part of matter of account; the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

15. (1) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

(2) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

Court to have powers as in references by consent. 16. The Court or a judge shall, as to references under order of the Court or a judge, have all the powers which are by this Act conferred on the Court or a judge as to references by consent out of Court.

Court of Appeal to have powers of Court. 17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the Court.

General.

Power to compel attendance of witness in any part of the United Kingdom and to order *habeas corpus* to issue. 18. (1) The Court or a judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum*, shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(2) The Court or a judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under

Statement of case
pending arbitration. a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of powers
by masters and other
officers. 21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court all or any of the jurisdiction conferred by this Act on the Court or a judge.

22. Any person who wilfully, and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open Court and may be dealt with, prosecuted and punished accordingly.

Crown to be bound. 23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

Application of Act
to references under
statutory powers. 24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.

Saving for pending arbitrations. 25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act, under any agreement or order made before the commencement of this Act.

Repeal. 26. (1) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(2) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

27. In this Act, unless the contrary intention appears,—

Definitions. "Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

" Court" means Her Majesty's High Court of Justice,

" Judge " means a Judge of Her Majesty's High Court of Justice.

" Rules of Court " means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent.	28. This Act shall not extend to Scotland or Ireland.
Commencement.	29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.
Short title.	30. This Act may be cited as the Arbitration Act, 1899.

SCHEDULES.

THE FIRST SCHEDULE.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(b) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(d) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(e) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writing, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(g) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may fix or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15 ...	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42 ...	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict., c. 125...	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict., c. 66 ...	The Supreme Court of Judicature Act, 1873.	Sections fifty-six, from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the word "special referees or". Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict., c. 61...	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven; both inclusive.

STATUTE LAW RELATING TO ARBITRATION IN BRITISH INDIA.

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